THE CANONS, THE CODE AND COUNSEL:
THE ETHICS OF ADVOCATES BEFORE COURTS-MARTIAL

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THE CANONS, THE CODE AND COUNSEL:
THE ETHICS OF ADVOCATES BEFORE COURTS-MARTIAL

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SCOPE

The tempo of our times proclaims that the end justifies the means. Fortunately, however, the Military Officer Lawyer marches to the sound of a different drum. The American Bar Association Canons of Ethics and the American College of Trial Lawyer's Code of Trial Conduct, as endorsed by the services and the Court of Military Appeals serve as guideposts to ethical conduct.

The present expansion of the United States Marine Corps and the other branches of the Armed Forces has brought many dedicated, highly-motivated, younger attorneys to practice as counsel before courts-martial. Despite the many fine articles that have treated with individual facts of the ethics of advocates before courts-martial, there is not now available for the consideration of present and incoming military attorneys, an overall discussion of the several, seemingly conflicting, responsibilities claiming their loyalty.

It is then the purpose of this thesis to consider the application of the Canons of Ethics and the Code of Trial Conduct to the military and to analyze and compare their provisions with those of the Manual for Courts-Martial. It is also the intent of this paper to provide a reference guide to the established precedents in the area including a treatment of disciplinary sanctions and to consider the reconciliation of the varied responsibilities claiming the military attorney's loyalty.

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CHAPTER I.

INTRODUCTION

> "The battle is the payoff"-Ralph Ingersoll
> "...and our battles still are won by justice...." -William Moody, An Ode in Time of Hesitation

A court-martial is a battle----combat in the military arena.[1] Tactics are the means by which one seeks to defeat an adversary once the battle is joined, be it small unit tactics in the sodden, steamy jungles of South Vietnam or trial tactics before that long green table in the battle scarred halls of military justice.

All too often however, the objectives gained by battle are proclaimed to justify the means employed - whether fair or foul. Despite the no holds barred protestations of those who would thus espouse this Machiavellian concept of subordinating morals to expediency, the ends do not justify the means. It is not unimportant what a trial lawyer does so long as he wins his case. Surely, for the prosecution, the ultimate aim is justice rendered and not conviction at any cost. Similarly for the defense counsel, partisan advocate though he may be, acquittal by any means should not be his goal. As we have rules of land warfare to govern combat in the field so must we have and observe ground rules of forensic engagement. The trial attorney must face and resolve the apparent dilemma between the tactics needed to ensure victory and the related need for justice every day of his professional career in the courtroom.[2]

Every attorney's trial tactics differ in many respects with reference to those of other lawyers as does his sense of justice. But, the field of honor

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[1] See Latimer, A Comparative Analysis of Federal and Military Criminal Practice, 15 Temp. L.Q. 1,15 (1955).

[2] See Lyne, Trial Tactics and Justice, in American Law Student Association, Lawyer's Problems of Conscience 48-49 (1953).

on which advocates join battle as champions of their clients is circumscribed by well delineated sidelines beyond which the combatants may not pass. The goal is secured by effectively using the entire available latitude of the field while staying in bounds.

The ground rules which govern the advocate's permissible latitude of trial tactics constitute a practical, down to earth, bread and butter subject. Rehearings of reversed court-martials cost time and money as well as professional embarrassment.

The most recent, most interesting and undoubtedly one of the future leading cases on the conduct of counsel was rendered during 1966 by the Court of Military Appeals in United States v. Lewis.[3] That case contains and condemns a virtual catalog of unethical practices of both trial and defense counsel including:

1. Both counsel testifying without withdrawing from the case in contravention of Canon 19.
2. Counsel referring to defendant's attempted negotiation of a pre-trial agreement.
3. Trial counsel mentioning misconduct of the accused not charged.
4. Acrimonious exchanges between counsel in an effort to blacken each other's reputation coupled with epithets such as "'two bit piece of cat-meat' who 'came out here with a crawling Army negotiation deal'..." and "damn liar".
5. Defense counsel and trial counsel becoming more concerned with hammering at each other than in giving the accused a fair trial.

The accused in a classic understatement made the subsequent observation

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[3] 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966).

that counsel in their zeal to attack each other somehow over-looked him.

The Court of Military Appeals severely critized both counsel who were senior attorneys and held that their activities, coupled with the failure of the law officer to control them, denied the accused a fair trial and reversed the conviction but gave authority to order a rehearing.

To fulfill his mission and adequately represent his client, every advocate's sights must be focused on the source and content of the ethical considerations which govern his trial tactics.

A. THE LAWYER'S PROFESSIONAL ETHICS

1. PURPOSES OF PROFESSIONAL ETHICS

Ethics form a small portion of the complex system of discipline which civilized society has imposed upon itself through laws, customs, moral standards and even social etiquette - rules of many kinds, enforced in many ways. A code of professional ethics constitutes a profession's voluntary assumption of self discipline supplementing but not supplanting the rules of conduct observed by the general public. Such a code of ethics is a practical working tool as necessary to the professional practitioner as his theoretical principles and technical procedures.[4]

A profession is characterized by highly complex activities which necessitate an extensive training period for its practitioners to acquire the needed skill and knowledge to enable them to render specialized service to a client. The complexity of the specialized service makes it impossible for the client to judge adequately the caliber of the services rendered in many instances until it is too late to take corrective action. In view of the general public's inability to judge the quality of these services and since the profes-

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[4] Carey & Doherty, Ethical Standards of the Accounting Profession 3-4 (1966).

sional practice provides the means of livlihood for the practitioner, a potentially deep conflict of interest exists. In effect, the adoption and self regulation of a code of ethics is the profession's way of informing its members of the standards of conduct required from them and notifying the public that the profession will protect the public's interest.

Professional legal ethics are basic principles of right action for attorneys at law. Such ethics do not involve solely moral questions but also include behavior designed for practical as well as idealistic purposes. "Ideals are standards conceived as perfect but not yet attained and perhaps even unattainable. Ideals are goals but they are not enforceable by rules."[5]

A code of professional ethics may be designed in part to encourage ideal behavior, but basically such a code is intended to be enforceable. It must set requirements at a higher level than the rules of conduct observed by the general public but yet to be a practical working tool, its requirements must be at a level lower than the ideal. To utilize a concept established by Carey and Doherty,[6] professional legal ethics may be regarded as a mixture of moral and practical concepts, with a sprinkling of exhortation to ideal conduct designed to evoke right action on the part of the members of the legal profession - all reduced to rules which are intended to be enforceable, to some extent at least, by disciplinary action.[7]

2. ORIGIN OF THE CANONS OF PROFESSIONAL ETHICS

Where do the ethical rules for attorneys originate? Throughout the

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[5] Id. at 6.

[6] Ibid.

[7] See Sutton, Re-evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint, 33 Tenn. L.Rev. 132,136 (1966) criticizing the American Bar Association (hereinafter cited as ABA) Canons of Professional Ethics for their mixture of the hcra tory and the prohibitory - setting forth highest professional aspirations in some parts and only minimum standards in others.

civilian community in the United States they have come from the American Bar Association, state societies of attorneys and from those state jurisdictions where such rules have been promulgated under authority of law. While not identical, the rules of these various organizations are similar. The basic principles are the same although the form, arrangement and extent of coverage may differ. The ethical principles of the American Bar Association, denominated the Canons of Professional Ethics, govern the professional conduct of the largest number of attorneys[8] and these Canons are the most widely known outside the profession. They have been adopted in whole or in part by many of the state bar associations.[9]

There are six sources of authority that define the Military Officer Lawyer's ethical obligations: (1) the Uniform Code of Military Justice (hereinafter cited as UCMJ or the Code); (2) the Manual for Courts-Martial, United States, 1951 (hereinafter cited as MCM, 1951, or the Manual; (3) appellate opinions of the United States Court of Military Appeals (hereinafter cited as the Court of Military Appeals) and the case decisions of the Boards of Review of the respective service Judge Advocates General; (4) the Canons of Professional Ethics of the American Bar Association; (5) the Code of Trial Conduct of the American College of Trial Lawyers and (6) the usages, customs and practice of the court-martial bar.

3. EVOLUTION OF THE CANONS OF PROFESSIONAL ETHICS

The first ascertainable code of professional ethics in the United States was that formulated and adopted by the Alabama State Bar Association in 1887.[10] Many of the states thereafter adopted similiar codes.[11] In 1905,

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[8] The ABA has 123,000 members. 12 American Bar News, No.1,p.10 (1967).

[9] Drinker, Legal Ethics 25 (1953).

[10] Drinker, Legal Ethics 23 (1953). As noted therein, the Alabama Code of Ethics was based largely on Judge Sharswood's Professional Ethics, reprinted as 32 A.B.A. Rep. (1907) and Hoffman's Fifty Resolutions, reproduced in Drinker's text at 338.

[11] Drinker, Legal Ethics 23-24 (1953).

the president of the American Bar Association appointed a committee of distinguished attorneys to report on the advisability and practicability of the adoption of a Code of Ethics by the American Bar Association. After that committee reported that the adoption of such a Code was both advisable and practicable, it was instructed to prepare a draft thereof. The Committee's draft was presented to the 1908 meeting of the American Bar Association in Seattle, Washington, and the thirty-two recommended Canons of Professional Ethics of the American Bar Association (hereinafter cited as Canons) were adopted on 27 August.[12] In 1928 Canons 33 to 45 were adopted and Canons 46 and 47 were adopted in 1933 and 1937 respectively.[13]

Although individual Canons have been amended throughout the years, they have remained essentially in their original form. It has been recognized for some time that the Canons as a whole needed to be brought up to date in the light of the vast changes in the practice of law and in the public responsibilities of lawyers since the beginning of the 20th century.[14] Accordingly, in 1964, the House of Delegates of the American Bar Association created a Special Committee on Evaluation of Ethical Standards to study the adequacy and effectiveness of the Canons.[15] In February 1965, the Special Committee which was composed of twelve lawyers, judges, and law professors, officially reported that the existing Canons were in need of substantial revision.[16] The American Bar Foundation then created a research project to work in collaboration with and in support of the Special Committee to prepare proposed changes to

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[12] Id.at 24; Robbins, A Treatise in American Advocacy 247 (1913).

[13] Drinker, Legal Ethics 25-26 (1953).

[14] Powell, The Presidents Page,50 A.B.A.J. 1005 (1964).

[15] Ibid.

[16] Cheatham, A Re-evaluation of the Canons of Professional Ethics-Introduction. 33 Tenn. L. Rev. 129, 130 (1966).

the Canons.[17] Tentatively the recommendations of the Special Committee (popularly known as the Wright Committee) are scheduled for release in the fall of 1967. Overall plans call for submission of a final draft to the House of Delegates at its midyear meeting in 1968.[18] It is not the intent of the Committee however, to rewrite de novo the ethical standards of the legal profession. The broad principles of most of the Canons have proved to be remarkably sound and enduring.[19] However, ethical concepts are not fixed, final or precise. They reflect the sense of responsibility and experience of the legal profession which it has developed up to a given point in time[20] and revision at this point in history is deemed most timely.

4. CODE OF TRIAL CONDUCT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

The American Bar Association promulgated its Canons of Professional Ethics for the legal profession as a whole. The American College of Trial Lawyers, because of its particular concern for the improvement of litigation proceedings and the trial conduct of counsel adopted its Code of Trial Conduct (hereafter cited as the Trial Code) in August 1956 in Dallas, Texas.[21] The Trial Code does not supplant the American Bar Association Canons but rather supplements and stresses certain portions of the Canons. The Trial Code was redrafted in 1963 and has been cited as authority and with approval by several appellate courts.[22]

The preamble to the Trial Code specifically provides that it expresses only minimum (not ideal) standards and should be construed liberally in favor of its fundamental purpose to improve the trial conduct of advocates.

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[17] Ibid.

[18] 12 American Bar News, No.1, p.18(1967); 11 American Bar News, No.9, p.3(1966).

[19] Powell, The President's Page, 50 A.B.A.J. 1005 (1964).

[20] See Carey & Doherty, Ethical Standards of the Accounting Profession 7(1966).

[21] American College of Trial Lawyers, Code of Trial Conduct 1 (1963). However, it should be noted that the original ABA Canons were drafted in an era when the lawyer's primary function was in dealing with actual or potential litigation problems and are consequently oriented toward adversary proceedings. Thode, The Ethical Standard for the Advocate, 39 Texas L. Rev. 575, 579(1961).

[22] Id. at Foreword

5. ENFORCEMENT OF THE CANONS AND TRIAL CODE

Since the American and State Bar Associations and the American College of Trial Lawyers are not legislative tribunals, their Canons and Trial Code do not have the force of law except in states where they have been adopted by statute or by rules of the state's highest court.[23] The Federal courts have no established code of ethical conduct, but the Federal Rules of Procedure, both civil and criminal, provide individual standards of ethical conduct.[24] The Canons and Trial Code however, are regarded by the courts as wholesome standards of professional conduct[25] and an attorney may be disciplined by a court for not observing them.[26]

Admittedly, the Canons are inadequate to provide specific answers for many cases that arise in daily practice. This is where the opinions of the American Bar Association Committee on Professional Ethics and, of course, the opinions of the ethics committees of the various state and local bar associations assist the practicing attorney and the courts in construing and interpreting the Canons.[27]

The Standing Committee on Professional Ethics of the American Bar Association was formed in 1914 to communicate to that association information concerning the activity of state and local bar associations in respect to the ethics of the legal profession. In 1919, the Committee's name was changed to the Committee on Professional Ethics and Grievances and by subsequent amendments to the bylaws of the Association was authorized to express its opinions

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[23] In the Matter of Cohen, 261 Mass. 484,159 N.E. 495 (1928).

[24] Thode, The Ethical Standard for the Advocate, 39 Texas L. Rev. 575,577(1961)

[25] Herman v. Acheson, 108 F. Supp.723 (D.D.C.1952). See American College of Trial Lawyers, Foreword to Code of Trial Conduct (1963).

[26] See Drinker, Legal Ethics 26-27 (1953) and cases cited therein.

[27] See Informal Opinion No.654,ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

concerning proper professional conduct when consulted by members of the bar or by any officer or committee of a state or local bar association. The attorney requesting an opinion need not be one of the more than 123,000 members of the American Bar Association.[28]

The American Bar Association Committee's first formal opinion was published on 15 January 1924.[29] Since that time it has published some 316 formal opinions involving interpretation of the Canons which it believes to be of broad general interest. In addition it has rendered more than 1200 informal opinions, in response to questions that arise less frequently over the years with over 100 informal opinions being currently issued each year[30] under the name of the Committee of Professional Ethics since, in 1958, the Committee on Professional Grievances was split off as a separate independent committee.[31] Formal opinions are published in the American Bar Association Journal when issued as are selected informal opinions.[32] Several of the informal opinions have concerned practice before military courts-martial.[33]

Although these American Bar Association and state ethical opinions are not binding on military advocates and tribunals, they do, of course constitute persuasive authority and have been cited as such by a board of review.[34]

Critics there are who state that since the Canons and Trial Code have

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[28] Drinker, Legal Ethics 31 (1953).

[29] *Ibid*.

[30] Armstrong, *A Re-evaluation of the Canons of Professional Ethics- A Practitioner's and Bar Association Viewpoint*, 33 Tenn. L.Rev. 154,156 (1966.

[31] ABA, Supplement to the 1957 Volume, Opinions of the Committee on Professional Ethics and Grievances iii (1964).

[32] Three compiled volumes of prior ethical opinions have been published by the ABA Committee on Professional Ethics: a 1957 bound volume, a 1964 paper supplement thereto and a 1966 soft cover unpaginated volume of informal decisions.

[33] Informal Decisions Nos.C-498 and 567, ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966). See also Informal Opinion No.879 in the same volume relating to the propriety of writing a military commanding officer to state claims against a serviceman.

[34] ACM S-17411, Seale, 27C.M.R.951, 954 (1958).

no built in sanctions, they are unrealistic and deserve to be ignored,[35] but they reckon without the strong restraining force activated by the acute personal embarrassment inherent in disciplinary proceedings together with the attendant impairment of professional reputation and possibility of disbarment.

B. APPLICABILITY OF THE CANONS OF ETHICS AND THE TRIAL CODE TO THE MILITARY LAWYER

1. THE OLD CODES: ROCKS AND SHOALS

The Canons of Ethics and the Trial Code are directly applicable as rules of professional conduct to military advocates practicing before courts-martial under the Uniform Code of Military Justice.[36] This is not a new innovation to the services brought about by the adoption of the Code in 1950. Under the precode practice, the 1937 edition of Naval Courts and Boards had quoted excerpts from the Canons for the information and guidance of courts-martial personnel.[37] The Trial Code, of course, was not in existence prior to the Code.

2. REGULATORY SOURCES APPLYING THE CANONS AND TRIAL CODE TO PRACTICE UNDER THE UCMJ

a. The Manual:

Paragraph 42 of the Manual provides generally for the conduct of counsel. Although the Canons are not cited directly in the Manual, appropriate portions thereof are included and paraphrased, some of which had previously been set out in Naval Courts and Boards before the enactment of the Code. The paragraph sets up ethical standards for a military bar.[38] Additional ethical standards are prescribed in paragraphs 6a, 44g&h, 46b, 48b,c,&f, 72b and 151b(2)

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[35] See Sutton, Re-evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint, 33 Tenn.L.Rev.132,137(1966).

[36] See Feld, A Manual of Courts-Martial Practice and Appeal 162(1957) as to the applicability of the canons.

[37] Naval Courts and Boards, 1937,§360 quoting excerpts from Canons 3,5, 6,8,9,15,16,17,18,22,37 and 44.

[38] Legal and Legislative Basis, Manual for Courts-Martial 27(1951).

of the Manual. The appendix to this paper contains a comparative table showing the interrelation between the Canons and the provisions of the Manual. Although the Manual provisions do not incorporate all of the Canons, the regulations of the Judge Advocates General do so, obviating the necessity to consider the effect of a violation by counsel of a Canon not incorporated into the Manual.

b. Army Regulation No.27-11(5 March 1965):

Paragraph 2 of this regulation includes as grounds for suspension of counsel the flagrant or continued violation of any specific rules of conduct prescribed for counsel in (1) paragraphs 42,44,46 or 48 of the Manual, or (2) the Canons of Professional Ethics adopted by the American Bar Association , or (3) the Code of Trial Conduct adopted by the American College of Trial Lawyers. Thus, in effect, the regulation adopts by reference both the Canons and the Trial Code as standards of professional conduct for advocates before courts-martial.

c. Manual of the Judge Advocate General of the Navy (JAG Manual):

Section 0135b of the JAG Manual provides that the Canons of Professional Ethics of the American Bar Association are considered to be generally applicable as rules of professional conduct for persons acting as counsel before naval courts-martial. Additionally the JAG Manual cites paragraphs 42,44, 46, and 48 of the Manual and quotes portions of the Canons for guidance.[39] It should be noted that all of the Canons are made applicable by the Navy and the mere fact that Canons 6 (Conflicting Interests), 8 (Advising on Merits of Client's Case), 22 (Candor and Fairness) and 44 (Withdrawal from employment as Attorney or Counsel), were specifically quoted in Naval Courts and Boards but not in the JAG Manual does not detract from their applicability to present

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[39] JAG Manual, 0135b quoting portions of Canons 3,5,7,9,15,16,17,18,21, 24,37 and 39.

day counsel.

d. Coast Guard Supplement to MCM 1951:

Section 0126c of this supplement provides that counsel in a court-martial case, whether lawyers or not, are to be guided by the Canons of Professional Ethics of the American Bar Association.[40]

Although neither the JAG Manual nor the Coast Guard Supplement refers to the Trial Code, it should be noted that their provisions relative to professional conduct and legal ethics were published prior to the Trial Code's publication. The incorporation of the Trial Code in the Army Regulation, which is more recent than those of its sister services, indicates that the provisions of the Trial Code constitute a standard to guide and measure the conduct of counsel which the other services will undoubtedly incorporate in any future regulations on the subject.

3. VALIDITY OF THE APPLICATION OF THE CANONS AND TRIAL CODE

Given the fact that the Manual and regulations of the various services have incorporated the Canons and Trial Code, it remains to be demonstrated, that authority for their action existed.

The Constitution of the United States empowers the Congress to make rules for the government and regulation of the land and naval forces.[41] Pursuant to that authority Congress enacted the Uniform Code of Military Justice on 5 May 1950, effective 31 May 1951, as a code of criminal law and procedure applicable to all of the armed forces of the United States. Article 36 of the Code provides that the procedure in cases before courts-martial may be prescribed by the President of the United States by regulations which shall, so far as he deems practical, apply the principles of law generally recognized

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[40] CGCM S21258, Vogt, 30C.M.R. 746,748(1961).
[41] U.S. Const. Art I., § 8, clause 14.

in the trial of criminal cases in the United States district courts provided they are not contrary to or inconsistent with the Code. Similar authority had been given to the President under the precede Articles of War to make such rules and regulations with respect to the Army and it is upon that provision that the current authority with respect to all of the armed forces is based.[42] Article 36 has been held to be a valid delegation by Congress to the President of the power to issue regulations governing court-martial procedure.[43]

The President exericised the authority granted to him by Congress when he issued his Executive Order no.10214 on 8 February 1951 promulgating the Manual for Courts-Martial, United States, 1951, effective 31 May 1951.[44] The text of the Manual was published in the Federal Register on 10 February 1951.[45]

Article 140 of the Code further provides that the President is authorized to delegate any authority vested in him under the Code and to provide for the subdelegation of any such authority.

In paragraph 43 of the Manual the President delegated his authority relative to procedure before courts-martial and provided that the Judge Advocates General of the armed forces in appropriate departmental regulations might announce rules defining professional or personal misconduct which would disqualify a person from acting as counsel before courts-martial.

In accordance with this delegated authority the aforecited Army, Navy and Coast Guard provisions were issued incorporating the Canons (and Trial Code) as standards of professional ethics and conduct applicable to advocates

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[42] Articles of War 38. Prior to the Code, the procedure for naval general courts-martial was never specifically provided for by statute. Snedeker, Military Justice Under the Uniform Code 306-307(1953).

[43] United States v. Smith, 13 U.S.C.M.A.105, 32C.M.R.105(1962). See United States v. Vierra, 14U.S.C.M.A.48, 33C.M.R.260,263(1963)(dictum).

[44] MCM,1951,p.ix.

[45] 16 Fed. Reg. 1303-1469(1951).

before courts-martial.

The crucial question, then is whether the paragraphs of the Manual prescribing professional conduct of attorneys and the action of the Judge Advocates General of the various services in applying the Canons and the Trial Code were valid exercises of the rule making power lawfully delegated by Congress in Article 36 of the Code.

That issue has not been specifically decided by the Court of Military Appeals. However the Court has clearly delineated the test. The Manual paragraphs and the regulations are valid and have the force of law if they are not contrary or inconsistent with the Code and do not conflict with other Manual provisions or principles of justice.[46] Clearly, the Canons and the Trial Code meet the test.

And what is more important, the Court of Military Appeals in its decided cases has presupposed that the Canons are fully applicable without the necessity of tracing the legality of their incorporation into military practice via the provisions of the Manual and the regulations promulgated by the service Judge Advocates General. Consider the cases where the Court has cited the Canons. In United States v. Kraskouskas, the Court in holding that an accused cannot be represented by a nonlawyer before a general court-martial stated as one of its reasons that the code of ethics would not apply to the nonlawyer.[47] Similarly, in his dissent in United States v. Mc Cants,[48] Judge Ferguson cites Canon 19 and quotes it verbatim, assuming with-out specifically stating, that

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[46] United States v. Smith, 13U.S.C.M.A. 105, 32C.M.R. 105,119(1962).

[47] 9 U.S.C.M.A. 607, 26 C.M.R. 387,390 (1958). The court surely did not mean to imply however that nonlawyer counsel at special court-martial are not governed by the Canons. See footnotes 53 and 54 infra and accompanying text for applicability of canons to special court-martial nonlawyer counsel.

[48] 10 U.S.C.M.A. 346, 27 C.M.R. 420,426 (1959).

the Canon is fully applicable to advocates before courts-martial.

In United States v. Stone,[49] the Court of Military Appeals cited Canon 19 in stating that testimony by a lawyer on behalf of his client is improper conduct unless it involves purely formal matters or is essential to the ends of justice. Again the Court did not preface its citation of the Canon with any indiction of the source of applicability of the Canons. In United States v. Young,[50] Judge Kilday writing for the Court stated that the disqualifications of counsel arising in both military and civilian prosecutions due to conflicts of interests or incompatible representation are resolved by adherence to the Canons of Ethics.

Most recently, in United States v. Lewis,[51] the court cited Canon 19 in condemning the fact that counsel testified from the witness stand.

These cases show that there is no doubt in the minds of the members of the Court of Military Appeals that the Canons are fully applicable to advocates before courts-martial.

The Boards of Review have also cited the Canons. In CM 410956, Bostic,[52] an Army Board of Review cited Canon 9 in a footnote in analogizing to the American Bar Association's rules forbidding an attorney to talk to the opposing party outside the presence of his counsel. Providing us with a specific answer to the applicability of the Canons to military counsel, the Coast Guard Board of Review in CGCM S-21258, Vogt,[5] held that counsel in a special court-martial case, whether lawyers or not, are to be guided by the Canons of Professional Ethics of the American Bar Association. Similarly in NCM S-58-01854, Field[54]

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49. 13 U.S.C.M.A. 52, 32 C.M.R. 52,56 (1962).
50. 13 U.S.C.M.A. 134, 32 C.M.R. 134,139 (1962).
51. 16 U.S.C.M.A. 145,148, 36 C.M.R. 301 (1966).
52. 35 C.M.R. 511,519 n.6 (1964), pet. denied, 15 U.S.C.M.A. 409, 35 C.M.R. 381 (1965).
53. 30 C.M.R. 746 (1961).
54. 27 C.M.R. 863,873 (1958) (concurring opinion).

a Navy Board of Review cited Canon 15 as defining the duties of a nonlawyer counsel before a special court-martial.

4. THE CANONS AND TRIAL CODE APPLY TO ALL SPECIALTIES WITHIN THE LEGAL PROFESSION

a. Canon 45:

> The canons of the American Bar Association apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

b. Trial Code 28:

> Although this Code of Trial Conduct is adopted by the American College of Trial Lawyers the College thinks the rules should apply to all lawyers wherever and by whom they may be employed.

As demonstrated above, the services have incorporated the Canons and Trial Code by reference. The terms of the Canons and Trial Code are not restrictive and permit their application to the specialty of the practice of criminal law before military courts-martial.

C. THE SEVERAL AFFIRMATIVE LOYALTIES OF THE MILITARY OFFICER LAWYER

The Marine Officer Lawyer, is more than a mere citizen. He, together with his sister service counterparts, stands as a guardian of liberty, a minister of justice, an officer of the Courts, his client's advocate and a member of dual honorable and learned professions. In these several capacities, it is his duty to promote the interests of the Corps and his Country, serve the cause of justice, maintain the authority and dignity of the courts-martial system, be faithful to his clients, candid and courteous in his dealings with his fellow attorneys and true to himself.

The succeeding chapters will provide a detailed insight into the responsibilities of the military advocate to these five specified affirmative loyalties: (1) Duty to the Military Service; (2) Duty to the Court; (3) Duty to the Client; (4) Duty to Fellow Attorneys; and (5) Duty to Himself together with the resolution of potential conflicts between them.

CHAPTER II

DUTY TO THE MILITARY SERVICE

> "Yours is the profession of arms...for a century and a half you have defended, guarded and protected...hallowed traditions of liberty and freedom, of right and justice...your guidepost stands out...thundering those magic words: Duty, Honor, Country."
>
> -General Douglas MacArthur, *Farewell Address at West Point* (1962)

A. MISSION OF THE MILITARY SERVICE

The most important thing in war will always be the art of defeating one's opponent in combat.[55] It is to the end of closing with and defeating the enemy in the field that the energies of the military commander and his forces are directed. The military attorney, as a special staff officer, exists to aid that commander in the performance of his mission. The military advocate filling a legal billet serves, he does not command. He is a team member to assist in coping with court-martial processes during the urgencies of war as well as the conveniences of peace, thus freeing the commander to devote more time and energy to his primary responsibility to prepare to meet and defeat our nation's enemies.

B. LOYALTY TO MILITARY SUPERIORS

In theory there is no basic conflict between the duties of the advocate as an officer of the service and as a military lawyer. As a military officer, he offers his oath and his allegiance to the Constitution of the United States and agrees to discharge well and faithfully the duties of his office.[56] As a lawyer he has sworn to support the Constitutions of the United States and

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[55] Clausewitz, *Principles of War* 17 (Gatzke transl. 1943).

[56] See military officer's oath in 5 U.S.C. § 16 (1964).

his state and his client.[57] The two oaths and obligations are not inconsistent.[58]

The military advocate is never clientless. He is employed by the United States Government and owes true faith and allegiance to that client: as represented by the convening authority of his assigned military organization until such time as he is released from that obligation to accept an individual defendant as his current client. Once the new attorney - client relationship has been established his obligation is to the new client during the existence of the relationship, unimpaired by competing loyalties to other persons within the framework of that representation. In the event of conflict his obligation is to his present client, but he must remember that he himself is a multi-faceted personality. He is not nor should he be a one case man. Accepting the advocates responsibilities with reference to one client does not relieve him of his responsibility to other defendants to whom he has been assigned provided the duties as to one do not overlap or conflict as to the others.

The trial counsel is in a similar position; until assigned to the trial of a particular court-martial, the convening authority is his client. But upon his assignment to trial, he does not with reference to that trial represent the convening authority as such. He represents solely the sovereignty of the United States and that is not synonymous with the person of the convening authority.[59]

Certainly trial counsel is appointed by the convening authority and much less aloofness necessarily marks the relationship of the trial counsel

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[57]. See ABA recommended oath of admission for attorneys. ABA, Canons of Professional Ethics, Oath of Admission to the Bar and Canons of Judicial Ethics 8 (1960).

[58]. But see Murphy, The Army Defense Counsel: Unusual Ethics for an Unusual Advocate, 61 Colum.L.Rev. 233,237-240(1961), for the opinion of an Army advocate that a basic conflict exists between the officer lawyer's obligation to his service and his client.

[59]. United States v. Olson, 7 U.S.C.M.A.242, 22 C.M.R. 32(1956)(dictum). See MCM, 1951, para.44d; United States v. Valencia, 1 U.S.C.M.A. 415, 418, 4 C.M.R. 7 (1952).

to the convening authority as compared with that of the defense counsel. This is so because the trial counsel is charged with the responsibility of reporting to the convening authority and the staff judge advocate concerning the status of pending cases, the results of all trials, the possibility of court membership in a particular case being reduced below a quorum, the inadvisability of trial in certain instances, and all substantial irregularities in the charges or the appointing order. But these facts however do not give rise to an inference of control. The trial counsel cannot be reduced to the likeness of an automaton by binding and detailed instructions. In this event the convening authority would both transgress the provisions of article 37 of the Code and deprive the accused of the protections inherent in the requirement that the counsel of a general court-martial -as well as his learned friend for the defense- be a duly qualified attorney.[60]

Defense counsel, the law officer and the members of the court are also designated by that convening authority for duty with the named court-martial, but the appointment does not make them instruments for the imposition of the convening authority's will. Each has a separate duty to perform and each must perform that duty free from any external personal prejudice or influence.[61]

Article 37 of the Code was enacted to curb any potential command influence and ensure freedom of action to the advocate. It provides, in part, that no convening authority or commanding officer shall censure, reprimand or admonish counsel before a courts-martial with respect to the findings or sentence adjudged by the court or with respect to that counsel's functions in the conduct of the proceedings.

During the past 185 years, the court-martial practice of the United States has evolved from an inquisitorial into a real adversarial proceeding.[62]

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[60] United States v. Haimson, 5 U.S.C.M.A. 208, 17 C.M.R.208,218 (1954).

[61] United States v. Olson, 7 U.S.C.M.A.242, 22 C.M.R. 32(1956)(dictum).

[62] Murphy, *The Army Defense Counsel: Unusual Ethics for an Unusual Advocate*, 61 Colum.L.Rev. 233,235 (1961).

Under the Code the accused is entitled to certified legal counsel at general courts-martial and defense counsel with legal qualifications equal to or superior to those of the trial counsel at special courts-martial.[63]

The Court of Military Appeals has analogized the Military defense counsel's duty of fidelity to his client to that of an attorney in a civilian criminal case[64] or to the standards of a civilian court appointed counsel or public defender.[65] The Court has clearly pointed out that counsel, once appointed, owes his paramount allegience to his client, the accused. In United States v. Darring[66] it held that defense counsel should give as much information to his client as possible regarding appellate representation and the decision concerning the requesting of such representation should only be predicated on the merits of the individual case and the accused's desires and not upon considerations of expediency or convenience to the service or its effect upon other courts-martial.

As stated by Judge Ferguson:

> It is the defense counsel's duty to advocate his client's cause and to support it in any manner consistent with the law and the canons of our profession. In short, he is an attorney for the accused, and his concurrent status as an officer in the armed services in nowise detracts from his professional duties.[67]

Earlier regulations limiting the defense counsel's conduct of his client's defense to means that are "not inconsistent with military relations"[68] and warnings against conducting the defense without "due regard for authority" have been entirely eliminated.[69] Of course, the Staff Judge Advocate is avail-

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[63] UCMJ, art. 27.

[64] United States v. McMahon, 6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956); United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234(1955). See also MCM, 1951, para. 48 c.

[65] United States v. Horne, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958).

[66] 9 U.S.C.M.A. 651, 26 C.M.R. 431,434 (1958).

[67] United States v. Watkins, 11 U.S.C.M.A. 611, 29 C.M.R. 427,437(1960)(dissent).

[68] Regulations For the Armies of the United States, 1910, § 977.

[69] Murphy, The Army Defense Counsel:Unusual Ethics for an Unusual Advocate, 61 Colum. L. Rev. 233,236 (1961).

able at all times for consultation by the defense counsel relative to problems on which the latter might desire advice in connection with a full presentation of his case.[70] The theory of military law is that the Staff Judge Advocate occupies a non partisan position in disciplinary proceedings.[71]

Admittedly, in practice, conflict may occur between the position of the advocate as a representative of his client and his position as a military officer, but normally it arises by virtue of the nature of human personalities and not because the two duties are basically inconsistent.

In United States v. Kitchens,[72] the subject of the relations of defense counsel with the Staff Judge Advocate and his assistant was drawn into clear focus. Defense counsel had raised the issue of command influence based on letters from the Assistant Staff Judge Advocate which the members of the court had seen. After the completion of the trial but before the trial of a co-accused, the Assistant Staff Judge Advocate called the defense counsel to his office and allegedly told him that "if he had not yet decided to live in peace in the office he would be dealt with accordingly." Defense counsel told the Assistant Staff Judge Advocate that he could not give up a legitimate defense. Shortly thereafter, the defense counsel received an efficiency rating from this officer that was substantially lower than two prior ratings received from that officer. The Court of Military Appeals vigorously condemned this form of pernicious command influence and recommended an investigation and also noted that punitive proceedings might be justified if the allegation was established.

The difficult point is that despite the protestations of the Court of Military Appeals against this unfair practice, the defense counsel's career may have been severely jeopardized by lowered efficiency reports that condemn by

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[70] United States v. Haimson, 5 U.S.C.M.A. 208, 17 C.M.R.208,220(1954)(dictum).
[71] United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234, 239 (1955)(dictum).
[72] 12 U.S.C.M.A. 589, 31 C.M.R. 175,178 n.3(1961).

faint praise. To alleviate the problem, some have recommended that counsel be physically situated in an office apart from the Staff Judge Advocate and that a different officer be assigned to prepare their efficiency reports.[73] Frankly, the limited number of military attorneys available to perform both court-martial and non court-martial work in the unit legal offices does not permit this luxury.

An advocate does not cloister himself in an isolated ivory tower upon accepting appointment to represent a particular client. He still must perform his military duties and responsibilities in areas that do not affect his current attorney - client relationship.

Apart from assignment to a new organization, there is no real solution to an in-office situation characterized by conflicting personalities. The only answer for the advocate is that one must do what he must. In the discharge of his paramount responsibilites to an assigned client he must stand on principle, provided it is undergirded with fact and law, against any real or fancied fear of disfavor and should not be influenced directly or indirectly by any considerations of self interest.

C. UPHOLDING THE LAW

It is axiomatic that counsel's responsibilities to the military service and himself preclude him from giving advice or assistance in violation of the law. Pause one minute, however before we move on to the duty of counsel to the court and consider the subtler variations. The advocate may not advise an imprisoned client what to do if he escapes from the brig[74] nor may he advise a client who has gone absent without leave to hide because he may not get a fair trial.[75] Morever the attorney is under an ethical obligation to disclose to the

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[73] See Taylor, Trial and Defense Counsel Program for General Courts- Martial, unpublished thesis, JAG School (1962).

[74] See Opinion No. 150, ABA,Opinions of the Committee on Professional Ethics and Grievances 313 (1957).

[75] Drinker, Legal Ethics 152(1953). Informal Decision No. 14,ABA,Opinions of the Committee on Professional Ethics and Grievances 628 (1957).

proper authorities any information he has as to the whereabouts of a client who has escaped from lawful custody.[76]

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[76] Opinion No. 155, ABA, Opinions of the Committee on Professional Ethics and Grievances 322 (1957). But see Opinion No. 23 at p.99 which the Committee in Opinion No. 155 limited to its particular facts.

CHAPTER III

DUTY TO THE COURT

> "Craft is the vice, not the spirit, of the profession. Trick is professional prostitution. Falsehood is professional apostasy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wiliest devices. The power of integrity is the rule; the power of fraud is the exception. Emulation and zeal lead lawyers astray; but the general law of the profession is duty, not success. In it, as elsewhere, in human life, the judgment of success is but the verdict of little minds. Professional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the Bench and the Bar."
>
> -Edward G. Ryan

A. TRIAL CONDUCT

1. CANDOR AND FAIRNESS

The Rule-Manual (para.42b), Canon 22 and Trial Code 23(a),(b):[77]

> The conduct of counsel before the court and with each other should be characterized by honesty, candor ad fairness. Counsel should not knowingly misquote the contents of a paper, the testimony of a witness, the language or agreement of opposing counsel, or the language of a decision or a textbook. He should not cite as authority a decision that he knows has been reversed or an official directive that he knows has been changed or rescinded. These latter and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

The Case Law -

Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates zeal in the opposing lawyers. But their strife can pervert as well as aid

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[77] The text of the Canons and Trial Code has been consolidated where possible to reduce redundancy and paraphrased when necessary to comport with court-martial terminology. Although the rules thus set forth are not direct quotations they have been blocked in single space for emphasis and ease of reference.

the judicial process unless it is supervised and controlled. Accordingly, the over riding social interest in impartial justice vests the neutral law officer with the power to curb both adversaries.[78]

The trial counsel is entitled to try the case as he sees it but his commendable desire to win a case must be tempered with a realization of his responsibility for ensuring a fair and impartial trial, conducted in accordance with proper legal procedures. However, the restrictions imposed upon him by virture of his duty cannot be so strictly applied as to cause reversal of every case wherein he takes a step which results in the sustaining of a defense objection. A mere error of judgment does not necessarily reach the level of misconduct.[79] But in those instances where the rights and immunities of an accused would be exposed to serious and obvious abuse, prejudical and excessive zeal on the part of the trial counsel will be curbed by the trial bench.[80]

Similarly, although it is the right of counsel for every litigant to press his claim, even if it appears untenable, the interests of society in the preservation of courtroom control are not to be frustrated through unchecked improprieties of defense counsel.[81]

The responsibility of candor establishes an affirmative duty on the trial counsel to disclose any grounds which he knows may exist for challenge of court-martial personnel such as disqualification of a law officer who had signed the pretrial advice as an acting staff judge advocate.[82]

THE UNREVEALED CITATION

The lawyer, though an officer of the court and charged with the duty of candor and fairness, in not an umpire, but an advocate. He is under no duty to

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[78] United States v. De Angelis, 3 U.S.C.M.A.298,12 C.M.R. 54 (1953).
[79] United States v. Valencia, 1 U.S.C.M.A. 415, 4 C.M.R. 7 (1952).
[80] United States v. De Angelis, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).
[81] See United States v. De Angelis, *supra* note 80.
[82] United States v. Schiller, 5 U.S.C.M.A. 101, 17C.M.R. 101 (1954).

refrain from making proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position. His personal belief in the soundness of his cause or of the authorities supporting it, is irrelevant.

However an attorney is under an obligation to refrain from making misrepresentations and he is also denied the luxury of material concealment generally regarded in the world of trade as "smart business."[83]

The advocate has the function of presenting and arguing the applicable law to the law officer. It is ethically proper for him to rely on and cite unreported Board of Review decisions in arguments or briefs even without advance notice to adverse counsel.[84] He is, however, prohibited from reading legal authorities or arguing the facts of other cases directly to the court members except in instances such as a motion for a finding of not guilty or the question of the accused's sanity where those members become the triers of the fact and, in effect, of the law as well.[85]

In recent years, there has been discussion and dispute as to whether the attorney must disclose to the law officer a known decision adverse to his client's contentions and apparently unknown to his adversary. There is no obligation to the client to withhold knowledge of the applicable law. Rather, the obligation is to present the applicable law to the law officer.[86] The test in every case requiring disclosure of such a decision is whether or not it is one which the court should clearly consider in deciding the case and is not solely confined

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[83] Wise, Legal Ethics 174 (1966).

[84] Informal Decision No. 667, ABA Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

[85] United States v. Bouie, 9 U.S.C.M.A. 228, 26 C.M.R. 8 (1958); United States v. Fair, 2 U.S.C.M.A. 521, 10 C.M.R. 19 (1953).

[86] Opinion No. 146, ABA, Opinions of the Committee on Professional Ethics and Grievances 306 (1957). See Thode, The Ethical Standard for the Advocate, 39 Texas.L. Rev. 585 (1961); Drinker, Legal Ethics 78 (1953).

to controlling authorities which would be clearly decisive of the case at bar. This requirement must be sensibly interpreted and a long string of Board of Review citations on a well settled point need not be presented to the law officer to fulfill the spirit thereof.[87]

After presentation of the authority however, the advocate is fully justified in then attempting to distinguish the case or even argue that it not be followed. The advocate's obligation is to represent his client fully in obtaining a determination of the law, not to conceal the applicable law.

A pretty fair country lawyer of some renown by the name of Abraham Lincoln also believed that adverse authorities should be cited. On his first appearance as an attorney before the Supreme Court of Illinois he informed the court that although he was unable to find any authority to support his position, he had found and submitted for the court's consideration several cases directly in point favoring his adversary.[88]

2. <u>ATTITUDE TOWARD COURT MEMBERS</u>

<u>The Rules</u>-

a. The Code, article 39:

> Whenever a court-martial is to deliberate or vote, only the members or the court shall be present.
> Any consultation of the court with counsel shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel and in general court-martial cases, the law officer.

b. The Manual (para. 42*b*):

> In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward the members of the court.

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[87] Opinion No. 280, ABA, Opinions of the Committee on Professional Ethics and Grievances 583 (1957); <u>but see</u> Tunstall, <u>Ethics in Citation: A Plea for Re-Interpretation of a Canon</u>, 35A.B.A.J.5(1949) arguing that the requirement for disclosure should be limited to controlling authorities.

[88] Parry, The Seven Lamps of Advocacy 19 (1924).

c. Canon 23 and Trial Code 19 (a):

> A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any court member, such as fawning, flattery, or actual or pretended solicitude for the comfort or convenience of the court members. Suggestions of counsel looking to the comfort or convenience of the court should be made to the law officer out of the hearing of the court members. Before and during the trial, counsel should avoid conversing or otherwise communicating privately with a court member on any subject whether pertaining to the case or not.

d. Trial Code 19 (b),(c),(d) and (e):

> A lawyer should disclose to the law officer and opposing counsel any information of which he is aware that a court member has or may have any interest, direct or indirect, in the outcome of the case, unless the law officer and opposing counsel have previously been made aware thereof by voir dire examination or otherwise.
> Subject to any limitations imposed by law, it is a lawyer's right, after the court has been discharged, to interview the members to determine whether their verdict is subject to any legal challenge. The scope to the interview should be restricted and caution should be used to avoid embarrassment to any court member or to influence his action in any subsequent case.
> Before the court is sworn to try the cause, a lawyer may investigate the prospective court members to ascertain any basis for challenge, provided there is no communication with them, direct or indirect, or with any member of their families. A lawyer should, immediately upon his discovery thereof, make full disclosure to the court of any improper conduct by any person toward any court member.

e. Trial Code 20 (a):

> In the voir dire examination of the court members, a lawyer should not state or allude to any matter not relevant to the case or which he is not in position to prove by admissible evidence.

<u>The Case Law-</u>

Any improper contact between the prosecution and the members of the court creates a presumption of prejudice. That presumption is rebuttable however. It is error for the trial counsel to make a pretrial inquiry of available court members to determine if they have conscientious scruples against imposing the death penalty in a prospective capital case.[89] Off the record private discussions

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[89] CM 395341, Boone, 24 C.M.R. 400 (1957). Error was held to be nonprejudicial under the particular facts of this case because government met the burden of rebutting the presumption of prejudice.

of trial counsel with the president of a special court-martial during the trial[90] or presence of the trial counsel in a closed court session[91] likewise constitute error.

Of course, reality can not be forsaken. Common sense must prevail in this area and it is both necessary and proper for the trial counsel to confer with the president of the court prior to the convening thereof to establish the time and place of convening and the applicable uniform.[92] Similarly, during a lengthy court-martial, witnesses, court members and even counsel may unavoidably be thrown together in the normal course of shared essential military duties during recesses and adjournments especially in combat and isolated overseas commands. The attainable standard is that all unnecessary contact be avoided during the period of trial and that the contact required by military necessity strictly avoid any discussion relating to the case or related subject matter.[93]

During the challenging procedure at trial, the voir dire examination may properly extend into the predispositions or prejudices, if any, of the members in order to lay a foundation for challenges for cause or a peremptory challenge. Thus, the defense counsel may properly inquire on voir dire into the fixed preconceptions or inelastic attitudes of a court member regarding the type of punishment (including punitive discharge) that the member feels should be imposed for particular offenses or upon a particular accused.[94] Similarly, although the trial counsel may not influence referral of a case to get a partisan court

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[90] MCM, 1951, para.53d; United States v. Bruce, 12 U.S.C.M.A.410, 30C.M.R. 410(1961); United States v. Randall, 5 U.S.C.M.A. 535, 18 C.M.R.159 (1955).

[91] See *Ex parte* Tucker, 212 F. 569 (D.C.Mass. 1913), a pre UCMJ case wherein it was held that the presence of trial counsel for a short time during the closed session of a court-martial was a procedural error only and not ground for a writ of habeas corpus.

[92] See dissent of Quinn, C.J. in United States v. Robinson, 13 U.S.C.M.A. 674, 33 C.M.R. 206, 214(1963); MCM, 1951, para. 40b(1).

[93] See United States v. Adamiak, 4 U.S.C.M.A. 412, 15 C.M.R.412,418(1954); United States v. Walters, 4 U.S.C.M.A.617, 16 C.M.R.191,207(1954).

[94] United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966).

panel, he is entitled to challenge members individually if he believes that they are predisposed to leniency.[95]

During the course of the trial proper, both counsel have an affirmative obligation to demonstrate care in handling exhibits marked for identification only. They should ensure that photographs, documentary and real evidence are not displayed to the court members before they are received into evidence. In so far as their size permits, such items should be kept turned in a direction away from the court members.[96]

When court members engage in improper and abusive questioning of the accused, the law officer should not require defense counsel to shoulder the burden of resisting the questioning at the expense of offending the interrogators. Although inaction by defense counsel under such circumstances has been held not to constitute a waiver,[97] there soon comes a point when he must intervene to protect his client adequately despite the possibility of nettled sensibilities if the law officer fails to act. The influence of the prejudicial matter on the court members must be curbed. Three courses of action are open to him: (1) object to the questioning, (2) challenge for cause the questioner who has departed from his role of impartial trier of the facts, or (3) move for a mistrial. Timidity in the face of wrongful action against his client is as unethical as legal skulduggery to preserve error in the record. Consider: counsel's assurance of eventual appellate reversal is of little immediate comfort to the convicted client who must languish in crossbar hotel pending that appellate review.

It is considered unethical for counsel in his argument to refer to in-

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[95] United States v. Williams, 11 U.S.C.M.A. 459, 29 C.M.R. 275(1960).

[96] MCM, 1951, para. 44g. See United States v. Wimberky, 16 U.S.C.M.A. 3, 36 C.M.R. 159(1966); United States v. Haimson, 5 U.S.C.M.A.208, 17 C.M.R.208(1954).

[97] United States v. Smith, 6 U.S.C.MA. 521, 20 C.M.R. 237(1955); United States v. Blankership, 7 U.S.C.M.A.328, 22 C.M.R. 118(1956).

[illegible]

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dividual court members by name.[98]

Trial counsel is charged with the responsibility to call errors or irregularities to the notice of the court and may call the attention of a special court-martial president to a conflict between the announced sentence and the sentence worksheet after the court has adjourned,[99] but the defense counsel should be informed of such action and be afforded the opportunity to object or request additional instructions relative thereto.[100]

A troublesome area with reference to the relationship of counsel to members of the court-martial concerns the ethical considerations involved when counsel attempt to poll the court members as to their vote or contact court members after the trial for the counsel's own educational benefit or to determine whether the verdict is subject to any legal challenge. Both Rule 31d of the Federal Rules of Criminal Procedure and Trial Code 19 (c) sanction such procedures as do several opinions of the Committee of Professional Ethics of the Association of the Bar of the City of New York.[101]

Admittedly, it is frequent practice for counsel to talk to court members upon the conclusion of a trial to learn what factors influenced the result or to find evidence which could be used to impeach the verdict. However, in 1934 opinion, (number 109), the American Bar Association Committee on Professional Ethics and Grievances held that a lawyer ethically has no right under Canon 23, after verdict, to seek out one or more members of a jury before whom he has tried a case and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case,

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[98] Informal Decision No.C-739,ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

[99] United States v. Liberator, 14 U.S.C.M.A.499, 34 C.M.R.279(1964). See also MCM, 1951, para. 44 g.

[100] United States v. Norwood, 16 U.S.C.M.A.310, 36 C.M.R.466(1966).

[101] Opinions Nos. 285,375 and 767, Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers' Association 151,199,463(1956).

and how certain members of the jury stood on certain questions, ever assuming that the lawyer did so for the purpose of informing himself as to any mistakes he may have made in the presentation of evidence or of testing his judgment relative to challenging of court members.[102]

Critics of this opinion pointed out that since Canon 23 only prescribes contact with jurors before and during trial, the Canon impliedly sanctions post-trial communications.[103]

Opinion 109 still stands. However, its vitality has been undercut and overruled sub silentio by Informal Decision 535 of the Committee rendered 6 October 1962 wherein the Committee opined in a gratuitous statement that after the trial, as a matter of his self education, or when necessary to prevent fraud or a miscarriage of justice, counsel may, with entire propriety, interview the jurors.[104]

What then is the military ethic? The first point has been clearly decided at the Board of Review level. Members of a military court-martial may not be polled as to their vote.[105] Voting in court-martials as to findings, sentence and challenges is by secret written ballot and a court member is bound by his oath, taken upon the convening of the court, that he will not disclose or discover the vote or opinion of any particular member upon a challenge or the findings or sentence, unless required to do so before a court of justice in due course of law.[106]

Are court-martial counsel then ethically precluded from discussing the case at all with court members upon the conclusion of the trial for their own

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[102] Opinion No.109,ABA,Opinions of the Committee on Professional Ethics and Grievances 231(1957). See also Informal Decision No.257, inthe same volume at 641.

[103] See Drinker, Legal Ethics 84n.38;Harnsberger,*Amend Canon 23 or Reverse Opinion 109*, 51 A.B.A.J. 157(1965).

[104] Informal Decision No.535,ABA,Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

[105] CM 394430, Conners, 23 C.M.R.636(1957). See ACM 6751(Rehearing),Tolbert, 14 C.M.R. 613(1953)(dictum).

[106] MCM, 1951, para. 114.

self-education? I think not. There are no military cases in point but the rules set forth in Trial Code 19(c) and Informal Decision 535 represent the modern and better reasoned approach. Caveat however, the scope of post trial communications with the court members should be restricted so as not to, directly or indirectly, delve into the vote or opinion of any member of the court upon a challenge or the findings or sentence or influence his action in future cases that may be referred to his court panel.

Loss of temper by counsel and threats to the court members by intemperate language are not only ethically improper but, human nature being what it is, may also ease his clients path directly to a federal penitentiary. During a discussion with regard to the compulsory production of witnesses, an individual civilian defense counsel in United States v. De Angelis[107] threatened the court; "If you ever pronounce judgment on this accused without power to produce the witnesses, you will, each and every one, be held civilly liable.[108] Result? His officer client's affirmed sentence amounted to dismissal, total forfeitures, confinement at hard labor for five years and a fine of $10,000 and the attorney was condemned by the Court of Military Appeals for his flagrantly contemptuous conduct. Moral: if you can keep your head when all about you are losing theirs, you may save your client his.

3. RESPECT AND COURTESY: DEALINGS WITH THE LAW OFFICER

The Rules-

a. The Manual (para. 42 b):

> In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward the law officer.

b. Canon 1:

It is the duty of the lawyer to maintain towards the Courts a respect-

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[107] 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).
[108] Id. at 58-59.

ful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Law Officers not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judiciary officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

c. Canon 3 and Trial Code 17:

Marked attention and unusual hospitality on the part of a lawyer to a law officer uncalled for by the personal relations of the parties, subject both the law officer and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the law officer as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a law officer special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the law officer's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

d. Trial Code 18:

During the trial, a lawyer should always display a courteous dignified and respectful attitude toward its presiding law officer, not for the sake of his person, but for the maintenance of respect for and confidence in the judicial office. The law officer, to render effective such conduct, has reciprocal responsibilities of courtesy to and respect for the lawyer, who is also an officer of the court. The lawyer should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate case record is made. In this regard, he should not be deterred by any fear of judicial displeasure or punishment.
A lawyer should not discuss a pending case with the law officer without the opposing lawyers presence, unless, after notice or request, the opposing lawyer fails or refuses to attend and the law officer is so advised.
Except as provided by rule or order of the court, a lawyer should never deliver to the law officer any letter, memorandum, brief or other written communications without concurrently delivering a copy to opposing counsel. Subject to the foregoing, a lawyer may advise the judge of any reason for expediting or delaying the decision.

<u>The Case Law</u>-

The law officer is not a mute and passive bystander until that moment when the court convenes for the trial of the accused. To assist him in his preparation for trial, counsel should contact him to provide him with a copy of the charges

and specifications, the appointing order and to inform him of anticipated issues of law that might be raised at the trial.[109] Trial counsel should serve upon the defense counsel a copy of any prospective memorandum of issues which he submits to the law officer or have that counsel present during oral communications with the law officer.[110] Although the defense counsel may ethically give the law officer unilateral notice of a prospective defense issue, as a practical matter it is suggested that he also notify his adversary to preclude the necessity of trial counsel's requesting a time consuming continuance at trial to prepare to meet the surprise issue. Defense counsel should also advise the trial counsel and the law officer of the anticipated plea of the accused.[111]

When questionable matters arise during the course of the trial which a counsel does not wish to be brought to the attention of court members, counsel should request an in-court hearing, commonly known as a side bar conference. The practice of such an in-court conference at the law officer's bench between the law officer, counsel for both sides, accused and the reporter in low tones which the court is unable to hear is both proper and useful for short discussions. The practice is recognized in the court-martial system.[112] For lengthy conferences with the law officer or where it is necessary to hear the testimony of witnesses out of the court's hearing, counsel should request the law officer to conduct an out-of-court hearing.[113] Out-of-court hearings are not authorized in special court-martials however because the president of the court is a voting member who must rule on evidentiary questions subject to the objection of any member or the court.[114]

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[109] United States v. Fry, 7 U.S.C.M.A. 682, 23 C.M.R. 146(1957).

[110] Informal Decision Nos. 251 and 253,ABA, Opinions of the Committee on Professional Ethics and Grievances, 640(1957). Drinker, Legal Ethics 78(1953).

[111] See dissent of Quinn, C.J., in United States v. Robinson 13U.S.C.M.A.674, 206 C.M.R. 206,214 (1963).

[112] United States v. Ransom, 4 U.S.C.M.A.195, 15C.M.R.195(1954). See MCM, 1951, appendix 8a, p.514 which provides for the use of in-court conferences.

[113] United States v. Cates, 9U.S.C.M.A.480,26C.M.R.260(1958);MCM,1951,para.57g(2).

[114] United States v. Baca, 16U.S.C.M.A.311, 36 C.M.R. 467(1966).

Criticism of the Law Officer

Profane rejections of legal rulings handed down by the law officer are unethical. The Court of Military Appeals will not tolerate any interference by either counsel or court members with the substance, form or tone of the law officer's rulings. Such rulings are final and are to be treated as such. Only in this manner can the integrity of his office be assured and the judicious, fair and impartial trial envisioned by the Code be guaranteed to the accused and to the public whose interests in military justice demand equal protection.[115]

It is the right of counsel to press his claim to obtain the law officer's considered ruling even if it appears far fetched and untenable. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by an appellate tribunal when infringed by incorrect rulings at the trial level. But, if the ruling is adverse, the "aggrieved" counsel, be he military or civilian, does not have the right to resist that ruling, use provocative language or threaten and insult the law officer.[116] Accordingly, in a trial commenced before the effective date of the Code, the Court of Military Appeals held it ethically improper for an individual civilian defense counsel, when questioned by the law member regarding his failure to call a witness who was present, to remark that the law member's question was the most absurd question he ever heard of, to ask the law member if he was trying to be funny and to state that any first year law student would know the answer.[117] Although counsel has the unquestionable right to press his arguments vigorously, he may not flout the authority of the law officer and to make a mockery of the requirement of decorous behavior.[118]

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[115] See United States v. Burse, 16 U.S.C.M.A.62, 36C.M.R.218(1966) where the Court of Military Appeals condemned the profane rejection of a law officer's ruling by the president of the court.

[116] Sacher v. United States, 343 U.S.1(1952).

[117] United States v. De Angelis, 3 U.S.C.M.A. 298, 12C.M.R. 54(1953).

[118] *Ibid*.

4. COURTROOM CONDUCT AND DECORUM

The Rules-

a. Canon 21 and Trial Code 22(b):

> A lawyer should be punctual in all court appearances and, whenever possible, should give prompt notice to the court and to all other counsel in the case, of any circumstances requiring his tardiness or absence. It is the duty of the lawyer to be concise and direct in the trial and disposition of causes.

b. Trial Code 20,21,and 22(a) and (c):

> In his opening statement, a lawyer should not state facts that he has no reason to believe will be substantiated by the evidence.
> A lawyer should not include in the content of any question the suggestion of any matter which he knows is untrue.
> A question should not be interrupted by an objection unless the question is then patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the court members.
> Examination of court members and of witnesses should be conducted from the counsel table or from some other suitable distance except when handling documents or physical evidence or when a hearing impairment or other disability requires that he take a different position.
> A lawyer should rise when addressing, or being addressed by, the law officer, except when making brief objections or incidental comments. (See also Manual para. 44 *g* (1)). While the court is in session, counsel should not smoke, assume an undignified posture, or, without the law officer's permission, remove his coat in the court room. He should always be attired in a proper manner.
> Every effort consistent with the legimate interests of the client should be made to expedite litigation and to avoid unnecessary delays, and no dilatory tactics should be employed for the purpose of harassing an adversary.
> A lawyer should make every reasonable effort to prepare himself fully prior to court appearances.

The Case Law

The adherence to proper professional conduct and courteous decorum is the responsibility of every counsel appearing at trial. When counsel at trial are guilty of unprofessional behavior by engaging in frequent bickerings, verbal altercations, frivolous objections, interruptions and exchanges based upon personalities, it is the law officer who has the authority to correct and chastise them, not the president of the court.[119]

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119. CM 399282, Cannon, 26 C.M.R. 593 (1958).

The professional conduct of advocates before courts-martial is a continuing matter of concern to the United States Court of Military Appeals. Judge Ferguson of that Court described the case of United States v. Sceles,[120] as a shocking example of how a general court-martial should not be tried. In describing the case he stated:

> Its pages are filled with petty bickering between counsel, each side seemingly more intent upon scoring on the opposing attorney than in attending to its task of insuring that justice is done fairly and impartially in surroundings characterized with the dignity and decorum befitting the seriousness of the proceedings. We remind law officers of their authority- nay, duty - to require military and civilian counsel to conduct themselves in a manner befitting their profession and the courts before which they practice.[121]

A word to the wise....

In the Sceles case, the court condemned the sharp practice employed by the trial counsel in personally requesting the president of the court to order it convened in fatigue uniforms to assist prosecution witnesses in their identification of the accused. The authority of the president of the court to prescribe the uniform may not be cleverly misused or perverted by trial counsel to become a weapon in order to ease the path of the prosecution in obtaining a conviction. Professional ethics and not Machiavellian principles must govern counsel's trial endeavors. The court will not tolerate misuse of military authority to gain a desired end. "Under our system of law, means are quite as important as ends, and the name of the Republic should not be soiled at the hands of one charged with enforcing its laws."[122] The court characterized trial counsel's unethical actions as "dirty business" to be vigorously condemned by every one involved in the administration of military justice.

As to uniform at trial, the accused is entitled to present himself before

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[120] 14 U.S.C.M.A.14, 33 C.M.R. 226 (1963).
[121] Id. at 227-228.
[122] Id. at 230.

a military tribunal so attired as to make the most favorable impression upon the members of the court. The use of fatigue uniforms detracts from the dignity of the court.[123] Except in combat or under field conditions, the service uniform should be prescribed and both trial and defense counsel have the responsibility to assure that the defendant appears properly dressed in a clean, pressed uniform bearing his correct insignia of rank and the ribbons, badges and emblems to which he is entitled.

The Manual prescribes that the accused appear in uniform at the trial.[124] It is the responsibility of the service to see that he does so. Absentees may have no uniforms at the time of their return to military control. It is error to permit the accused to stand trial in civilian clothes and that error is compounded when the trial counsel makes reference to the fact in his closing argument as a fact supporting an inference of an intention to desert.[125]

A further word to counsel, new at the military bar - and assuredly this point is not being overstressed. Confinement installations simply do not include modern dry cleaning facilities. Service uniforms, if any, of personnel in confinement are kept folded, neatly or otherwise, in seabags or similar containers. While that wrumpled, lived in look, may be the fashion mode of today's young people, it has no place in the courtroom. While pressing this point it is the trial counsel who must make arrangements to have the accused present at the trial. Have his unit get him there early enough that his defense counsel has time for further consultation before trial starts. It is too late for trial counsel, with his adversary, to start looking for the accused or to inspect his uniform ten minutes before the gavel sounds to start the court. To save embarrassment, think, plan ahead and then supervise the execution of pretrial arrangements. Counsel must

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[123] Ibid.

[124] MCM, 1951, para. 60.

[125] CGCM S-20255, Hoch, 20 C.M.R.563(1955). The error was held to be nonprejudicial under the facts of this case.

produce results not excuses.

Trial counsel has been strongly critized by the Court of Military Appeals for having a set of signals arranged with a courtroom spectator to alert the trial counsel to testimony involving classified information.[126] Whispering between counsel at the prosecution's table referring to the accused as a thief and scoundrel is improper and unjudicious. Personal hostility or excessive zeal upon the part of trial counsel is improper because it precludes the accused from receiving a fair presentation of the evidence.[127]

OPENING STATEMENT

An opening statement by counsel for either side is a recognized procedure in trials by court-martial.[128] Usually, such opening remarks take place after arraignment, but prior to the hearing of evidence, and normally consist of a brief comment on the issues to be tried and what respective counsel expects to prove.

The matter of the propriety of counsel's remarks in an opening statement at trial has been the subject of judicial review. A 1961 Air Force Board of Review case found no misconduct on the part of trial counsel when his opening statement alluded to a prior assault by accused on the victim and referred to the assault weapon as being honed to razor sharpness even though a subsequent trial ruling by the law officer precluded him from presenting evidence to prove the prior assault and no evidence was later adduced as to the weapon's sharpness. The Board found that there was nothing in the record which would indicate a deliberate flouting of the rules of evidence in order to prejudice the court against the accused and concluded that the trial counsel's comments did not exceed the bounds of fairness.[129]

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[126] United States v. Kauffman, 14 U.S.C.M.A. 283, 34C.M.R. 63(1963).

[127] See ACM 4455, De Angelis, 4 C.M.R. 654(1952),*aff'd* 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

[128] MCM, 1951, para. 44*g* (2).

[129] ACM 17542, Moore, 31 C.M.R. 647, *pet. denied*,12 U.S.C.M.A. 760, 31 C.M.R. 314 (1961).

The test is whether the general import of the evidence is consistent with the opening remarks. Trial counsel is entitled in his opening statement to make fair comment upon the testimony he expects to prove and a slight variance will not constitute misconduct on his part or prejudice to the accused.[130]

DILATORY AND OBSTRUCTIVE TACTICS

Obstructive and abusive actions of counsel flout the authority of the court, make a mockery of the requirement of decorous behavior and impede the expeditious, orderly and dispassionate conduct of the trial.[131] Although counsel unquestionably has the right to press his arguments vigorously and freely explore all avenues favorable to his client, there is a limit beyond which he may not ethically go.

The deliberate use of frivolous or unwarranted dilatory tactics cannot be sanctioned.[132] The government's not at the mercy of defense counsel who continually claims unpreparedness thereby indefinitely postponing trial. If such claims are frivolous or intended solely for the purpose of delay, recourse may be had by the removal of such dilatory counsel by competent authority and by replacing him with counsel who will effectively assist the accused.[133] Most civilian advocates find that they must work evenings when engaged in the trial of a lawsuit, and military counsel must be prepared to do likewise.[134]

"Criminal litigation is not a game." Thus commented both the majority and the dissent in United States v. Heinel.[135] A rehearing was ordered in that case because defense counsel was denied a continuance to inspect a transcript of the former testimony of a witness. By way of dicta, therein, there was unanimous agreement as to the consequences of defense counsel's improper trial tactics and failure to bear his trial responsibilities:

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[130] United States v. Hooper, 9U.S.C.M.A.637, 26C.M.R.417(1958).

[131] United States v. De Angelis, 3U.S.C.M.A.298, 12C.M.R.54(1953).

[132] See Army Reg.No.27-11,para.1(5 March1965);U.S.Dep't of Navy, JAG Manual § 135 b(2) (1961).

[133] United States v. Frye, 8 U.S.C.M.A.137, 23 C.M.R.361,367(1957)(dissent)(dictum).

[134] United States v. Heinel, 9 U.S.C.M.A.259, 26 C.M.R.39,45(1958)(dissent).

[135] 9 U.S.C.M.A.259, 26 C.M.R.39 (1958).

(1) Silence when defense counsel has the duty to speak may constitute a waiver. There is a responsibility for an accused, as well as for the Government, to deal fairly with the court. Defense counsel cannot knowingly and willfully withhold information of matters affecting the trial such as an unauthorized view by the court members of the scene of the incident on the chance that it may have a favorable effect, and then, when disappointed, complain. Even rights guaranteed by the Constitution may be considered surrendered when the accused knowingly declines to avail himself of them at the trial. The Court of Military Appeals will not permit the defense counsel to remain silent and speculate cunningly as to a court's findings when he has a responsibility to speak out before these findings.[136]

Defense counsel must be consistent. His trial theory, tactics and strategy will be binding on the accused. When he uses a trial incident for his client's advantage, he ordinarily cannot later contend on appeal that the incident was prejudicial to him.[137]

(2) Self induced error by the defense counsel may not be used as a basis for appellate reversal. In a criminal case the ultimate issue of the guilt of innocence of the accused is to be determined by a fair trial and not the competence of counsel. But it cannot serve the ends of justice to permit a defendent to prosecute one theory in the trial court and finding it unsuccessful, not only substitute another theory on appeal, but also to claim error arising out of that which he himself has invited.[138] But the Court of Military Appeals will decline to apply this rule of waiver where necessary to prevent a clear miscarriage of justice.[139]

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[136] See also United States v. Wolfe, 8U.S.C.M.A.247, 24 C.M.R.57(1957); United States v. Walters, 4 U.S.C.M.A.619, 16 C.M.R.191,202(1954)(dictum).

[137] United States v. Simonds, 15 U.S.C.M.A.641, 36 C.M.R.139(1966).

[138] See also United States v. Jones, 7 U.S.C.M.A. 623, 23 C.M.R. 87(1957); United States v. Schafer, 13 U.S.C.M.A. 83, 32 C.M.R. 83(1962).

[139] United States v. Brux, 15 U.S.C.M.A. 597, 36 C.M.R. 95(1966); United States v. Masusock, 1 U.S.C.M.A. 32, 1 C.M.R. 32(1951).

Judge Latimer in his dissent in Heinel, however, felt that the defense counsel had ample pretrial opportunity to learn of and obtain a copy of the transcript. The Judge opined that the holding of the majority ate away at the vitals of an effective court-martial system, leaving the law officer as putty in the hands of a clever but vexatious defense counsel. He commented:

> The accused was represented by an aggressive trial defense counsel who used every stratagem to aid his cause. He represented his client well but, in my view, he proceeded under a theory that a trial by court-martial is a game in which the prize goes to the defense lawyer who can delay the final judgment, confuse the issues, and hamper the progress of trial by making numerous dilatory motions...He played his part well, but I am not willing to applaud the performance.[140]

Similarly, with reference to the instructions given by the law officer to the court members on the elements of the offenses charged, the defense counsel cannot assume that he has no responsibility whatsoever for protecting the interests of the accused and insuring the fair and orderly administration of justice by raising appropriate objections to improper procedures. The Court of Military Appeals is not willing to see court-martial trials become a game where a sly defense counsel can acquiesce in erroneous instructions merely to build a record for obtaining reversal on appeal. It is the duty of the defense counsel to see that the theory of the case most favorable to his client is adequately presented to the court. Not only must he be prepared in advance to argue for the submission of a proper framework of law to the court members; he should also be prepared to submit proposed instructions to which the defense view of the evidence can be fitted. Defense counsel does justice neither to the accused nor to his duty as an officer of the

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140. United States v. Heinel, 9 U.S.C.M.A. 259, 26 C.M.R. 39,43,47(1958).

court when he relies principally on error and appellate review to protect his client.[141]

A defense counsel has been criticized for obstructive tactics in refusing to permit an accused to answer the law officer's essential question as to guilt during an out-of-court hearing to determine the providency of the defendant's guilty plea. The Court of Military Appeals stated that the defense counsel should assist, rather than attempt to restrict, the law officer in fully developing the circumstances surrounding the plea.[142]

5. CRIMINAL PROSECUTION AND DEFENSE

The Rules-

a. The Code, article 38:

> The trial counsel of a general or special court-martial shall prosecute in the name of the United States.
> The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel, and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court.

b. The Manual (para. 44g(1)):

> Although the primary duty of the trial counsel is to prosecute, any act, such as the conscious suppression of evidence favorable to the defense, which is inconsistent with a genuine desire to have the whole truth revealed is prohibited.

c. Canon 5 and Trial Code 4:

> The trial counsel's primary duty is not to convict but to see that justice is done. Evidence which appears credible and which clearly tends to prove the accused's innocence should not be suppressed. The secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.
> It is the duty of the defense counsel, regardless of his personal

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[141] United States v. Smith, 2 U.S.C.M.A. 440, 9 C.M.R. 70,72-73(1953). Counsel cannot however be required to submit proposed instructions. United States v. Walters, 4 U.S.C.M.A. 617, 16 C.M.R. 191, 205(1954); MCM,1951, para.73c(2).

[142] United States v. Palacios, 9 U.S.C.M.A. 621, 26 C.M.R. 401 (1958).

> opinion as to the guilt of the accused, to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence, to raise all valid defenses and, in case of conviction, to present all proper grounds for probation or in mitigation of punishment. A confidential disclosure of guilt alone does not require a withdrawal from the case. However, after a confidential disclosure of facts clearly and credibly showing guilt, a lawyer should not present any evidence inconsistent with such facts. He should never offer testimony which he knows to be false. The crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of such person's probable guilt.

The Case Law-

The responsibilities and duties of trial counsel or defense counsel in a court-martial are among the most important that can be imposed on a military officer. Provision was made in the Code for defense counsel to protect the rights of the accused, and for trial counsel fairly and accurately to prosecute in the name of the United States; further provision in this regard is made in Executive Order 10214 publishing the Manual by which the President, as Commander-in-Chief, implemented the Code. Military defense counsel who fails to exert every lawful effort in furtherance of an accused's rights and privileges, technical or otherwise, is himself flaunting the will of Congress and the order of his Commander-in-Chief. So also does trial counsel who fails fairly, fully and adequately to present the prosecution's case. A trial counsel or defense counsel who does not seriously discharge his duties to the best of his ability with a sober understanding that such duties are among the most important tasks that he will be called upon to perform as an officer has failed to discharge an important trust.[143]

The Court of Military Appeals has defined the duties of trial and defense counsel before courts-martial and their relationship to the court. They represent their respective clients in an adversary proceeding scrutinized by opposing counsel under the supervision of the law officer. Although both are considered offi-

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[143] CGCM S-19369, Branigan, 3 C.M.R. 515 (1952).

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of the women, [illegible] in the
name of [illegible]
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in-Chief. [illegible] to
prevent the [illegible]
ing that such [illegible]
in the position [illegible][112]

The [illegible]
women before [illegible]
their respective [illegible]
and under the [illegible]

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[112] [illegible]

cers of the court,[144] the partisanship of their advocacy for their clients differs.

The basic duty of an advocate in an adversary system is to do that which, within the framework of the honorable and legitimate means known to law is for the client's best interests. Furthermore, as trial lawyers know, the advocate generally must be a partisan advocate if he is to achieve maximum effectiveness.[145]

Defense counsel is an advocate for the accused not an amicus to the court.[146] Furthermore he is a partisan advocate for his accused client.[147] As an example of this position consider the case of ACM S-3923 Boese.[148] Therein after the trial counsel had announced that there were no previous convictions, defense counsel stated that the record should be checked. The court recessed for that purpose and, after the recess, the records of two previous convictions were admitted into evidence. The sentence awarded by this special court-martial included a bad conduct discharge which would not have been permissible but for the previous convictions. The Board of Review set aside so much of the sentence as was based on the previous convictions. It held that the unexplained action of defense counsel in calling the court's attention to the previous convictions was prejudicial to his client's interests. Counsel's duty in this situation was to marshall the matters properly in evidence in the way most favorable to his client, not to offer evidence against him.

However, the trial tactics of the defense must be within and not without

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144. See Ferguson, J. in United States v. Kraskouskas, 9 U.S.C.M.A. 607, 26 C.M.R. 387,390(1958) and United States v. Stone, 13 U.S.C.M.A. 52, 32 C.M.R.52,56(1960).

145. See Sutton, Re-evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint, 33 Tenn.L.Rev. 132 (1966).

146. United States v. Mitchell, 16 U.S.C.M.A. 302, 36 C.M.R. 458 (1966); Ellis v. United States, 356 U.S. 674 (1958).

147, See dissent of Ferguson, J. in United States v. Young, 13 U.S.C.M.A. 134, 32 C.M.R. 134,141 wherein he refers to the partisan advocacy of both defense counsel and counsel for the government at an article 32 pretrial investigation. See also Murphy, The Army Defense Counsel: Unusual Ethics for an Unusual Advocate, 61 Colum. L. Rev. 233 (1961).

148. ACM S-3923, Beese, 6 C.M.R. 608 (1952). But see Opinion No 287, ABA, Opinions of the Committee on Professional Ethics and Grievances 609 at 615 (1957..

the truth and the law. The common notion that in a criminal case the prosecution is bound to a high degree by the ethics of advocacy, whereas the defense counsel is bound by little or none has been the subject of much reconsideration. There has been an increasing protest against that philosophy of advocacy which would allow the defense to treat the law as a mere game while holding the prosecution to the highest standards of fair play and candor.[149]

Judge Warren E. Burger of the Court of Appeals for the District of Columbia has stated:

> It must be remembered that there is not a dual standard of conduct, one for the prosecutor and one for the defense counsel. Nor is there a different standard of professional duty as between paid or unpaid counsel. The fact that improper conduct of a prosecutor is more readily dealt with by reversal of convictions should not lead defense counsel to believe that such conduct goes unnoticed by the court.[150]

Trial counsel, occupies an anomalous position. His role is not that of the truly partisan advocate, but rather, his primary duty, as a representative of the government, is to see that justice is done.[151]

In United States v. Valencia, in assessing the limitations to be placed on the conduct of the trial counsel, the Court of Military Appeals said:

> ...He is representative, not of a party to ordinary civil litigation, but of the sovereign state. It is his primary duty to see that justice is done....We have no desire to quell the natural desire of counsel to win a case with which he is associated. However, in the case of the trial counsel, this quite commendable zeal must be tempered with a realization of his responsibility for insuring a fair and impartial trial, conducted in accordance with proper legal procedures. This duty has a peculiar significance in the conduct of court-martial trials, in view of the historical status of the 'trial judge advocate' as the legal representative of both the accused and the Government. Winthrop, Military Law and Precedents, 2d ed., 1920 Reprint, p. 194.[152]

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[149] Tuttle, The Ethics of Advocacy, 18 A.B.A.J. 849,851 (1932).

[150] Jackson v. United States, 297 F 2d. 195,198(D.C.Cir.1961)(concurring opinion).

[151] United States v. Johnson, 3 U.S.C.M.A.447, 13 C.M.R.3(1953). But see United States v. Haimson, 5 U.S.C.M.A.208,218, 17 C.M.R.208,218(1954) to the effect that the trial counsel is at least in some degree a "partisan" and Latimer, J. in his dissent in United States v. Beatty, 10 U.S.C.M.A.311,318, 27 C.M.R. 385,392(1959)(dissent) quoting a Georgia state court of appeal decision to the effect that the public prosecutor is necessarily a "partisan."

[152] United States v. Valencia, 1 U.S.C.M.A.415, 4 C.M.R.7,10(1952).

And in the course of its opinion in the case of *United States v. Berger*, the Supreme Court of the United States stated:

> The United States Attorney trial counsel is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. *But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*[153]

There are limitations of course on how far trial counsel must go to fulfill his ethical obligations. As stated by Judge Latimer in his dissent in *United States v. Beatty*, the trial counsel does not have the burden of impeaching his own witnesses, briefing defense counsel on the evidence which is readily obtainable, assisting defense counsel in the preparation of his case, or advising defense counsel what evidence should be introduced. A trial is an adversary proceeding and the essentially conflicting interests of opposing counsel must be considered.[154]

It is axiomatic however, that trial counsel coming into possession of facts favorable to an accused but unknown to him, should either present them to the court or, at the very least, disclose them to the defense.[155] However, the trial counsel is not obligated to present at the trial proper, all the proof adduced during the Article 32 investigation so long as testimony material to the defense is not suppressed.[156]

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[153] United States v. Berger, 295 U.S. 78 at 88(1934).(Emphasis added.)

[154] United States v. Beatty, 10 U.S.C.M.A.311, 27 C.M.R. 385 at 392 (1959). See also MCM, 1951, para. 44*h*.

[155] Quinn, C.J. in United States v. Stringer, 4 U.S.C.M.A. 494, 16 C.M.R. 68,82(1954)(dissent).

[156] See United States v. Petrowske, 13 U.S.C.M.A.330, 32 C.M.R.330(1962); Harris v. Sanford, 78 F. Supp.963(N.D.Cal1947);United States v. Kalumphy, 13 U.S.C.M.A.60,32 C.M.R. 60,62 (1962) (dissent).

In military criminal cases, the defense counsel has available to him on behalf of his client much more direct and generally broader means of discovery than would normally be available to him in civilian criminal practice. In the ordinary general court-martial case, all relevant evidence against the accused in the hands of the government is made directly available to defense counsel in the Article 32 pretrial investigation[157] and he can also call witnesses on behalf of his client and request the investigating officer to obtain other evidence which may be relevant. Also at the trial proper, the accused's right to subpoena witnesses and make motions for appropriate relief gives him practically unlimited means for the production of favorable evidence.[158] However the availability of machinery for extensive discovery and production of evidence does not entitle defense counsel to use that machinery for improper purposes and proper discovery of documentary evidence requires that the documents be relevant to the subject matter of the inquiry and that the request be reasonable before the defense counsel is entitled to obtain them.[159]

The advocate is more than a hired brain and voice; the arms which he wields should be used by him as a warrior, not as an assassin.[160] The adversary system is infused with tacit restraints governing both the prosecution and the defense. The partisan advocate fulfills his responsibilities when his zeal for his client's cause promotes a wise and informed decision of the case by the impartial triers of the fact. He fails to fulfill his role and trespasses against the obligations of professional responsibility when his desire to win at all costs leads him to distort and obscure the court members' understanding of the case

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[157] UCMJ, art. 32.
[158] MCM, 1951, paras. 34d,e. Compare Rule 6(e) Fed. R. Crim. P. with UCMJ art.32.
[159] United States v. Franchia, 13 U.S.C.M.A. 315, 32 C.M.R. 315(1962).
[160] Parry, Seven Lamps of Advocacy 18 (1924).

rather than providing them with a needed perspective as to the accused's theory of the case.[161]

6. DISCOVERY OF FRAUD

The Rules-

a. The Manual (para. 48 c):

> It is improper for counsel to tolerate any manner of fraud or chicane.

b. Canons 41 and 15 and Trial Code 25:

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeaver to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.
> The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.

The Case Law-

While the fundamental requirement of a fair and impartial hearing applies to presentencing procedures, an important basic policy governing such proceedings requires that as full a picture as possible be presented to assist the court in imposing a proper sentence; nevertheless, the accused is not permitted to portray a false impression of the economic situation of his wife and child to the court in the guise of extenuation or mitigation.[162] Note should be taken of a New York case, *Matter of Hardenbrook*,[163] where an attorney who insisted on the truth of his client's testimony in a civil case when he knew it to be false was barred.

7. EXPRESSING PERSONAL BELIEF

The Rules-

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[161] *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

[162] CM 411402, Stevenson, 34 C.M.R. 655 (1964) *pet. denied*, 15 U.S.C.M.A. 670, 35 C.M.R. 478 (1964).

[163] 135 App. Div. 634 (1909), *aff'd* 199 N.Y. 539 (1910).

a. The Manual (para. 44 g(1) and 48 c):

> It is improper for the trial counsel or defense counsel to assert before the court his personal belief as to the guilt or innocence of the accused.

b. Canon 15:

> It is improper for an attorney to assert in argument his personal belief in his client's innocence or in the justice of his cause.

c. Trial Code 20 (h):

> A lawyer should not assert in argument his personal belief in the integrity of his client or of his winesses or in the justice of his cause which is unrelated to a fair analysis of the evidence touching these matters.

The Case Law-

It is no proper concern of the court that counsel is personally convinced by the evidence he has presented. The appearance of undue influence on the court must be avoided since it is the independent responsibility of each court member to resolve impartially the question of the accused's guilt or innocence in accordance with the law and the evidence admitted in court within the dictates of his own conscience, not in accordance with what counsel say they have proved.[164]

It has also been held error for the trial counsel to express his personal belief that the testimony of the accused was a lie.[165]

8. PERSONAL EXPERIMENTS

The Rules-

a. Trial Code 12:

> A lawyer should never conduct or engage in experiments involving any use of his own person or body except to illustrate in argument what has been previously admitted in evidence.

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[164] ACM 5651, Robinson, 7 C.M.R. 618 (1952), *pet. denied*, 2 U.S.C.M.A. 691, 8 C.M.R. 178 (1953).

[165] CM 409603, Reddick, 33 C.M.R. 587 (1963). *But see* United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956).

The Case Law -

Immediately prior to the trial in United States v. Mc Cants,[166] the trial counsel received two potential exhibits: a rifle and cartridge. He thereupon while outside the courtroom loaded the cartridge into and then extracted it from the weapon. Thereafter, during the trial when firearms examiner had testified for the defense that the round in question had never been extracted from the rifle because it bore no markings, the trial counsel testified in rebuttal as to his experiment and then in closing argument stressed the conflict between the expert's testimony and his pretrial experiment when arguing that the rifle was loaded making it a dangerous weapon at the time of the offense.

The Cout of Military Appeals in the Mc Cants case said that it looked with disfavor on the procedure employed by the trial counsel. The court stated that it was unnecessary for the trial counsel to become involved because another service member, familiar with the operation of the rifle in question could have performed the experiment. It concluded that the error constituted poor judgment on the part of the trial counsel and nonconformance with profession standards of conduct but did not require reversal under the particular facts of the case. The case was reversed on other grounds.

Judge Ferguson dissented as to the majority's opinion regarding the experiment, cited Canon 19 and pointed out that in effect trial counsel created the evidence. Although the point was not spelled out, trial counsel had tampered with the evidence prior to trial and could have placed marks on the cartridge that were not there when he received it. As the majority opinion indicated, the proper solution would have been for trial counsel to have the expert witness, not counsel, conduct the experiment in open court during cross-examination.

Informal opinion No. 914 of the American Bar Association's Committee on

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166. 10 U.S.C.M.A. 346, 27 C.M.R. 420 (1959).

Professional Ethics[167] held that it is unethical conduct for an attorney to substitute other persons for the true defendants at the defendant's table in open court to mislead the court. A similar practice foisted on the court in a general court-martial convened prior to the Code was condemned and the defense counsel, one Lieutenant Shapiro was later tried and convicted for delay of the court based upon his unethical tactics.[168]

9. PUBLICITY AND NEWSPAPER DISCUSSION

The Rules-

a. The Manual (para. 42b and 53g):

> As publication in the public press, or on the radio or television, or the circumstances of a pending case may interfere with a fair trial and otherwise prejudice the due administration of justice, counsel should refrain from discussing such circumstances with representatives of the press, radio, or television unless authorized by the convening authority or other competent superior authority. The taking of photographs in the courtroom during an open or closed session of the court or broadcasting the proceedings from the courtroom by radio or television will not be permitted without the prior written approval of the Secretary of the Department concerned.

b. Canon 20:

> Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

c. Judicial Canon 35, American Bar Association, Canons of Judical Ethics:

Improper Publicizing of Court Proceedings

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions, and the broadcasting or televising of court proceedings,

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[167] Informal Opinion No. 914, ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

[168] Shapiro v. United States, 26 B.R. 107 (1943).

> detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

d. Trial Code 24:

> A lawyer should try his cases in court and not in the newpapers or through other news media. He should not publish, cause to be published, or aid or abet in any way, directly or indirectly, the publication in any newspaper or other documentary medium, or by radio, television or other device, of any material concerning a case on trial or any pending or anticipated litigation, calculated or which might reasonably be expected to interfere in any manner or to any degree with a fair trial in the courts or otherwise prejudice the due administration of justice. If extreme circumstances of a particular case require a statement to the public, it should not be made anonymously and reference to the facts should not go beyond quotation from the records and papers on file in court or other official documents. No statement should be made which indicates intended proof or what witnesses will be called, or which amounts to comment or argument on the merits of the case.

<u>The Case Law</u>-

The provisions of Canon 20 have been the subject of much dispute among attorneys for some time. Clearly however, even though the Canon refers only to newspapers because it was drafted prior to the development of television and radio, it includes within its scope and meaning the means of public communication developed since its adoption in 1908.[169] The Manual provision, of course, does cover all the media and despite one's own preferences, it must be recalled that the provisions of the Manual which are not contrary to or inconsistent with the Code, have the force and effect of law.[170] Ethics opinions have held radio or television broadcasts of court proceedings from the courtroom to be improper.[171]

It is not a question of freedom of the press which here concerns us. The press and all other news media are free to print whatever is in the public record.

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[169] Informal Decision No.805, ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

[170] United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105(1962).

[171] Opinions Nos. 67 and 212, ABA, Opinions of the Committee on Professional Ethics and Grievances 163,425 (1957).

But when an attorney on one side publishes statements before or during the trial of a case concerning evidence to be offered or alleged facts about the case, a counter-statement from the opposing attorney may well be called for, and in the ensuing battle of publicity, the public or the press, without benefit of the rules of evidence, may influence the decision in the case to the detriment of the rights of the litigants. It is not the function of an advocate to try his case outside the courtroom and gratuitous comments made publicly or through news media about the case before it is finally disposed of by the court, violates the spirit of the governing ethical rules.[172]

Of course, military trials are public and if a local news media considers a court-martial of sufficient public interest to detail a reporter to follow the trial developments, there is no prejudice to the accused in the reporter's attendance at public sessions of the court. This sort of reportorial coverage is of every day occurrence in civilian criminal cases.[173]

Nor is a press conference by the accused and a later press release, approved by the convening authority, prejudicial to an accused where the accused insisted on holding the press conference and the subsequent press release was no more than a factual report of what had occurred up to the time of its release.[174]

The question of what information should not be divulged to the news media, in cases where a release has been authorized, still remains. Opinion No. 31 of the Ethics Committee of the Colorado Bar Association[175] provides that both mem-

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[172] Informal Decision No. 805, ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

[173] ACM 8803, Berry, 16 C.M.R. 842,851, pet. denied, 5 U.S.C.M.A. 843, 17 C.M.R. 381, (1954).

[174] WC NCM 58-00063, Henderson, 29 C.M.R. 717 (1958).

[175] The content of this opinion adopted 6 June 1964 is contained in Sears, A Professor's Viewpoint -Re-evaluation of the Canons of Professional Ethics, 33 Tenn.L.Rev.149,152(1966). The opinion was based largely on the Report of the Published Comment on Pending litigation of the Committee on the Bill of Rights of the Association of the Bar of the City of New York presented to the annual meeting of that association on 11May1954. See also Opinion No.199,ABA,Opinions of the Committee on Professional Ethics and Grievances 400(1957).

bers of the bar and the press have a duty to refrain from publishing in criminal proceedings: (1) any prior criminal record of the accused; (2) any alleged confession or admission of fact bearing upon the guilt of the accused; (3) any statement of a public official as to the guilt of the accused; (4) any statement of counsel's personal opinion as to the accused's guilt or innocence; and (5) any comment upon evidence, credibility of any witness or matter which has been excluded from evidence. In addition to these five categories, a proposed amendment to Canon 20 also would exclude any comment on the results of or the defendant's refusal to take any test or examination, the identity of prospective witnesses except the victim and the possibility of a plea of guilty to the offense or a lesser included offense.[176]

10. <u>TREATMENT OF WITNESSES AND LITIGANTS</u>

<u>The Rules</u>-

a. Manual (para. 42 <u>b</u>):

> In performing their duties before courts-martial counsel should treat adverse witnesses and the accused with fairness and due consideration.

b. Canon 18:

> A lawyer should always treat adverse witnesses and suitors with fairness and due consideration and he should never minister to malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyers conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

c. Trial Code 15 (c) and (d):

> A lawyer may advertise for witnesses to a particular event or transaction but not for witnesses to testify to a particular version thereof.
> A lawyer should never be unfair or abusive or inconsiderate to

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[176] Advisory Committee on Fair Trial and Free Press, <u>Proposed Amendment to Canon 20</u>, 1967 N.J.S.B.J. 1608.

> adverse witnesses or opposing litigants. or ask any question intended only to insult or degrade the witness. He should never yield, in these matters, to suggestions or demands of his client or allow any malevolence or prejudice of the client to influence his actions.

<u>The Case law</u>-

It is improper conduct for a trial counsel to threaten a defense witness for testifying on the accused's behalf.[177] Similarly it is improper for trial counsel to continue the questioning of a witness in open court after he has repeatedly refused to answer questions on the basis of his privilege against self incrimination.[178] Such continued questioning in effect adds weight to the prosecution case while effectively denying the defense counsel an opportunity to cross-examine. The solution in questionable cases, of course, is to have counsel and the law officer question the witness in an out-of-court hearing relative to his continued refusal to testify.[179]

Improper examination of a witness by the trial counsel that is persistent and contumacious is prejudicial and cannot be cured by an order directing that it be expunged from the record and disregarded.[180]

And a last word of caution when advising clients who are witnesses in the court-martial of another. It will be no defense to a witness who wrongfully refuses to testify after receipt of a grant of immunity, that he so refused on the basis of the erroneous advice of counsel.[181] Know the law before attempting to advise a client how to act in accordance therewith.

B. IMPROPER EVIDENCE

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[177] See United States v. Grady, 13 U.S.C.M.A.242, 32 C.M.R.242(1962)(dictum).

[178] United States v. Belden, 11 U.S.C.M.A.182, 28 C.M.R.406(1960); CM 411430, Bricker, 35 C.M.R. 566(1965).

[179] Ibid.

[180] See United States v. O'Briski, 2 U.S.C.M.A.361, 8 C.M.R.161(1953)(dictum).

[181] United States v. Kirsch, 15 U.S.C.M.A. 84, 35 C.M.R.56(1964).

1. TESTIMONIAL EVIDENCE

Proper preparation by trial and defense counsel requires consideration of the pertinent rules of evidence so that counsel will only seek to introduce competent evidence at the court-martial.[182] Questions should be directed to the eliciting of testimony which is relevant to some issue properly before the court and which, under the general rules of evidence, is competent as proof of such issue. This does not mean, however, that counsel must be absolutely sure of the admissibility of certain testimony before they seek to present it to the court, for it is proper to offer testimony of doubtful relevancy or competency; but conduct on the part of counsel which displays a deliberate disregard of the rules of evidence in an attempt to influence or confuse the members of the court is highly improper.[183]

Although the form and content of questions put to witnesses is largely within the discretion of examining counsel, certain types of questions are improper, and may be prohibited in the discretion of the ruling officer. Among these questions that are generally considered improper are the following types:

a. Ambiguous or indefinite questions.[184]

b. Misleading questions. Accordingly, questions which assume facts that are not in evidence or misquote facts about which the witness has testified are improper.[185] Similarly, questions should not be asked for the purpose of suggesting matters known not to exist, nor questions that are clearly inadmissible and are asked, without expectation of answer, to prejudice the court members.[186]

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[182] MCM, 1951, 44*f* (3), 48*g*.

[183] United States v. Johnson, 3 U.S.C.M.A.447, 13 C.M.R. 3,8 (1953): United States v. Valencia, 1U.S.C.M.A.415, 4 C.M.R. 7(1952).

[184] MCM,1951,149*g*(2). See United States v. Berthiaume, 5 U.S.C.M.A.669, 18 C.M.R.293,308(1955)(dissent). See also United States v. Russell, 3 U.S.C.M.A.696, 14 C.M.R.114(1954);CM 350178, Taylor, 2 C.M.R.438,442(1952).

[185] MCM, 1951, 149*g*(2).NCM 258, Stockdale, 13 C.M.R. 540,543(1953).

[186] MCM, 1951, 149*g*(3).ACM 7761, Schreiber,16 C.M.R. 639,672(1954), *aff'd* 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955).

c. Multiple questions contained in a single question.[187]

d. Previously asked and answered questions.[188]

e. Argumentative questions which have no valid purpose concerning the impeachment of testimony.[189]

f. Unnecessarily accusing, insinuating, defaming, harassing, annoying or humiliating questions which have no legitimate or reasonable impeachment basis.[190]

g. Leading questions during direct or redirect examination except as to[191]

(1) preliminary or introductory matters,

(2) ignorant, youthful or timid witnesses,

(3) inadvertent erroneous statements,

(4) directing attention to a particular subject, or

(5) hostile witnesses.[192]

To aid the law officer or president of the special court-martial, in his task of ruling initially on the admissibility of evidence, there is imposed upon counsel the duty of objecting to evidence considered to be inadmissible. The specific grounds for the objection must be stated, and ordinarily new bases may not be raised for the first time on appeal.[193]

2. <u>INFLAMMATORY MATTERS</u>

It is elementary that the prosecution should refrain from offering any sort of evidence for an inflammatory purpose. However, if the item of proof is admissible for a legitimate purpose, the fact that it may also possibly tend to possess

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[187] MCM, 1951, 149g(2). NCM 258, Stockdale, 13 C.M.R.540,543(1953).

[188] CM 366778, Bills, 13 C.M.R.407,412(1953);CM 353183,Phillips, 9 C.M.R. 186,198 (1952),*aff'd* 3 U.S.C.M.A.137, 11 C.M.R.137(1953).

[189] See Munster & Larkin, Military Evidence 349(1959)and cases cited therein.

[190] MCM, 1951,para.54a,149b(1).United States v. Berthiaume, 5 U.S.C.M.A.669, 18 C.M.R.293,308(1955)(dissent);ACM S-2303, Whitaker, 5 C.M.R.539,559(1952)(concurring opinion).

[191] United States v. Bigelow, 11 U.S.C.M.A.527, 29 C.M.R.343(1960);United States v. Randall, 5 U.S.C.M.A.535, 18 C.M.R.159(1955);United States v. Smith, 3 U.S.C.M.A.15, 11 C.M.R.15 (1953).

[192] MCM,1951,para.149c.ACM 18943,Crocker,35C.M.R.725,736(1964).

[193] United States v. Brown,10U.S.C.M.A.482,28C.M.R.48(1959).MCM,1951,para.46c.

a shocking aspect which might conceivable excite the passion of the court members is not, in and of itself, ground for reversal.[194] The trial counsel has a right to offer whatever evidence he thinks best suited to help the court-martial understand the testimony provided he does not exceed the bounds of propriety by using unduly inflammatory items. He is not compelled to accept a defense offer to stipulate those facts which photographs, such as those of a murder victim's blood covered head, were intended to corroborate.[195] The law officer has wide discretion in the admission of evidence of this kind.[196] The test is whether the probative value of the evidence outweighs the nature of the exhibit.[197]

Accordingly, the following items have been held to be admissible over defense objections that they served only to arouse the passions of court members to the prejudice of the accused: skull and skin of a deceased female victim,[198] colored photographs of bruises on an assault victim,[199] photograph of a blind aged female assault victim,[200] colored photographs and transparencies of a deceased child showing some limited dissection during the course of the autopsy,[201] photographs of wounds on the body of a homicide victim,[202] sketch of a female body showing physical injuries suffered by a rape victim,[203] and a photograph of the body of a child rape-homicide victim.[204]

Similarly, although trial counsel should avoid inflammatory comments during argument, facts and circumstances interwoven with the offense need not be shunned even though they cast the accused in an unfavorable light.[205] Accordingly, in clos-

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[194] United States v. Bartholomew, 1 U.S.C.M.A.307, 3 C.M.R. 41,48(1952).
[195] United States v. Lee, 4 U.S.C.M.A. 571, 16 C.M.R. 145(1954).
[196] United States v. Wimberley, 16 U.S.C.M.A.3, 36 C.M.R. 159 (1966).
[197] United States v. Thomas, 6 U.S.C.M.A.92, 19 C.M.R.218 (1955); CM 412739, Coleman, 36 C.M.R. 574 (1965), *pet. denied*, 36 C.M.R. 541 (1966).
[198] United States v. Thomas, *supra* note 197.
[199] CM 400743, Swisher, 28 C.M.R. 470, *pet. denied*, 28 C.M.R. 414 (1959).
[200] United States v. Bartholomew, 1 U.S.C.M.A. 307, 3 C.M.R.41 (1952).
[201] ACM 17412, Houghton, 31 C.M.R.579, *aff'd* 13 U.S.C.M.A.3,32 C.M.R.3(1962).
[202] United States v. Harris, 6 U.S.C.M.A.736, 21 C.M.R.58,(1956).
[203] United States v. Bennett, 7 U.S.C.M.A. 97, 21 C.M.R. 223 (1956).
[204] United States v. Hurt, 9 U.S.C.M.A. 735, 27 C.M.R. 3 at 47 (1958).
[205] United States v. Day, 2 U.S.C.M.A. 416, 9 C.M.R. 46 (1953).

ing argument in a murder trial it was held that trial counsel did not overstep the bounds of propriety and fairness when he characterized the act as a "cold blooded murder" and referred to the accused as an otherwise "nice chap who has his own private philosophy of who should live and who should die" who had convened a board in which he was not only the convening authority, judge and jury but in fact was the "lord high executioner."[206]

3. POLYGRAPH DEVICES AND TRUTH SERUMS

It is well settled that neither the results of a "lie detector" interrogation nor a truth serum (sodium amytal or pentothal) test is admissible in a trial by court-martial.[207] The right of refusal to take a lie detector test falls within the privilege against self incrimination and it is improper for the trial counsel to introduce such evidence or argue the same.[208]

In United States v. Ledlow,[209] the Court of Military Appeals stated that the principal reason why the results of polygraph examinations are inadmissible lies in the probability that the court members would attribute undue significance to those results in their ultimate determination of the accused's guilt or innocence. Additionally, the tests are not infallible and are subject to the perils of conscious deception by a suspect.[210]

However, the mere fact that an accused is interrogated with the aid of a polygraph does not render a subsequently obtained admission or confession inadmissible in a trial by court-martial.[211] Accordingly, when evidence of a poly-

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[206] United States v. Lee, 4 U.S.C.M.A. 571, 16 C.M.R. 145 (1954).

[207] United States v. Massey, 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955), United States v. Bourcher, 5 U.S.C.M.A. 15,22, 17 C.M.R. 15,22 (1954). *Cf.* United States v. Wolf, 9 U.S.C.M.A. 137, 25 C.M.R. 399 (1958).

[208] ACM 14909, Cloyd, 25 C.M.R. 908 (1958).

[209] 11 U.S.C.M.A. 659, 29 C.M.R. 475 at 479 (1960).

[210] United States v. Massey, 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955).

[211] See United States v. McKay, 9 U.S.C.M.A. 527, 26 C.M.R. 307(1958)(dictum); CM 410956, Bostic, 35 C.M.R. 511 (1964), *pet. denied*, 15 U.S.C.M.A. 409, 35 C.M.R. 381 (1965); ACM 19180, Driver, 35 C.M.R. 870 (1965).

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graph examination (although not the results thereof) is adduced during the determination of the admissibility of such a confession or admission, it is necessary for the law officer to give detailed instructions to advise the court members of the limited purposes for which the references to the polygraph examination were before the court and to guide the members past the shoals of prejudicial misconception by advising them not to speculate upon the results of the examination.[212]

4. REFERENCE TO PRIOR MISCONDUCT AND JUDICIAL PROCEEDINGS

The rule has long been established in both the civilian community and at military law that evidence of offenses or acts of misconduct of the accused other than those charged, are generally inadmissible where their only relevance is to show the accused to be a "bad guy" with criminal dispositions or propensities. The rationale is that the intrusion of such evidence may endanger the integrity and essential fairness of the proceeding.[213] However, recognized exceptions to this basic rule authorize the introduction of such evidence to establish the identity of the accused as the perpetrator of the offense charged, the accused's ability to commit the offense, the plan or design of the accused, intent or guilty knowledge on the part of the accused, motive or modus operandi or to rebut an issue raised by the defense.[214]

Accordingly, it is prejudicial error for trial counsel to attempt to impeach an accused by cross examining him about prior acts of misconduct not resulting in conviction of a felony or crime of moral turpitude.[215] The accused cannot be tarred with innuendoes or insinuations of the possible commission of despicable

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[212] See ACM 19180, Driver, *supra* note 211.

[213] United States v. Kirby, 16 U.S.C.M.A. 517, 37 C.M.R. 137 (1967); United States v. Lewis, 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966); United States v. Hoy, 12 U.S.C.M.A. 554, 31 C.M.R. 140, (1961).

[214] See MCM, 1951, para. 138*g*; U.S. Dep't of Army, Pamphlet No.27-172, Military Justice-Evidence 60-68 (2d ed. 1962).

[215] United States v. Russell, 15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964); United States v. Robertson, 14 U.S.C.M.A. 328, 34 C.M.R. 108 (1963).

crimes and his credibility thus impaired to weaken his defense in an attempt to strengthen the government's case. Although a witness other than the accused may be impeached by showing he has committed an act of misconduct (without conviction) affecting his credibility, every departure from the norm of human behavior may not be shown on the pretext that it affects credibility.[216]

Paragraph 153 b (2)(b) of the Manual adopts the federal court rule under which it is proper to impeach the credibility of a witness by proving a prior conviction without first questioning the witness concerning such conviction.[217] In the absence of a conviction, counsel is bound by the witness' answer concerning commission of prior acts of misconduct and may not introduce independent evidence thereof eventhough the witness denies the act.[218]

In the absence of some special consideration or the intervention of some Manual or otherwise binding rule, it is error to elicit that a witness, as well as an accused, has been proceeded against in the juvenile court and the admission of such evidence is cause for reversal if it materially prejudices the substantial rights of the accused. In the case of minors, the policy of protecting the infant outweighs the necessity of impeaching his veracity.[219]

But the shield of public policy which guards against disclosure of juvenile misdeeds cannot be used to pervert justice by protecting the accused against disclosure of his own testimonial untruths.[220]

Evidence that one of several accused entered a plea of guilty or was con-

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[216] United States v. Berthiaume, 5 U.S.C.M.A. 669, 18 C.M.R. 293 (1955); United States v. Long, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952).

[217] United States v. Weeks, 15 U.S.C.M.A. 583, 36 C.M.R.81 (1966); United States v. Moore, 5 U.S.C.M.A. 687, 18 C.M.R. 311 (1955). See Williams v. United States, 3 F.2d. 129 (8th Cir.1924).

[218] United States v. Robertson, 14 U.S.C.M.A. 328, 34 C.M.R. 108 (1963); United States v. Shepherd, 9 U.S.C.M.A. 90, 25 C.M.R. 352 (1958).

[219] United States v. Yanuski, 16 U.S.C.M.A. 170, 36 C.M.R. 326 (1966) as to witnesses; United States v. Roark, 8 U.S.C.M.A. 279, 24 C.M.R. 89 (1975) as to the accused.

[220] See United States v. Kindler, 14 U.S.C.M.A. 394, 34 C.M.R. 174, 180(1964).

victed on a separate trial is not admissible on the issue of guilt of another accused. This rule applies not only when the accused are charged with the same offense, but also extends to a situation in which the offenses charged arose out of the same circumstances. Every defendant has the right to have his guilt or innocence determined by the evidence against him and not by what has happened with regard to a criminal prosecution against someone else.[221]

It is also prejudicial error for the trial counsel to question the accused as to admissions of guilt which he had made during a preliminary inquiry by the law officer into the providence of a plea of guilty entered at an earlier trial which was terminated by the declaration of a mistrial or at the present trial where a plea of not guilty was entered because of subsequent statements inconsistent with the plea of guilty.[222]

Finally, in presenting evidence as to a charge of breach of restraint while under correctional custody, it is neither necessary nor permissible to prove the offense for which the correctional custody was imposed. Proof simply of the status of correctional custody is sufficient. To permit proof of the offense for which the custody was imposed in effect gives the court an opportunity to again punish for the original offense, rather than for the breach of restraint alone.[223]

5. COMMAND OPINIONS RELATIVE TO THE CASE

It is unethical for trial counsel to bring to the attention of the court any sort of intimation of the views of the convening authority or his staff judge advocate with respect to matters within the jurisdiction of the court either as to the findings or the sentence.[224] It is also improper for trial counsel to re-

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[221] United States v. Humble, 11 U.S.C.M.A.38, 28 C.M.R.262(1959); MCM, 1951, para. 140 b.

[222] United States v. Barben, 14 U.S.C.M.A. 198, 33 C.M.R. 410 (1963).

[223] United States v. Mackie, 16 U.S.C.M.A. 14, 36 C.M.R.170(1966). See also United States v. Yerger, 1 U.S.C.M.A. 288, 3 C.M.R. 22 (1952).

[224] United States v. Lackey, 8 U.S.C.M.A.718, 25 C.M.R.222(1958). See United States v. Haimson, 5 U.S.C.M.A.208, 7 C.M.R. 208 (1954). See also MCM, 1951, para.44g.

fer to departmental policies such as the seperation of thieves from the service.[225]

6. RELIANCE OF THE ACCUSED ON HIS RIGHTS AGAINST SELF INCRIMINATION

The Court of Military Appeals has consistently held that pretrial reliance by the accused upon his rights under article 31 of the Code, by declining to make a statement is inadmissible in evidence against him. It so held in United States v. Jones[226] where the court determined that portions of the accused's pretrial statement indicating that he invoked article 31 when asked why he had become involved in the theft of a generator should have been masked out prior to the statement's submission into evidence; in United States v. Andrews[227] where testimony had erroneously been permitted concerning the refusal of the accused to submit to a blood alcohol test; in United States v. Russell,[228] a case where the trial counsel improperly called attention to the fact that the accused had not taken advantage of favorable odds by submitting to a blood test; in United States v. Tackett[229] where an investigator was incorrectly permitted to testify that the accused refused to make a statement without consulting counsel; and in United States v. Brooks[230] where criminal investigators were improperly permitted to relate that the accused had relied upon article 31 of the Code. Error in Brooks was compounded by permitting cross examination of the accused as to the reasons for his silence.

Article 31 of the Code preserves to the accused before a court-martial the full benefit of the Fifth Amendment and extends and enlarges the benefits of that Constitutional safeguard. It has been held to be prejudicial error to permit the

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[225] United States v. Fowle, 7 U.S.C.M.A. 349, 22 C.M.R.139 (1956).

[226] 16 U.S.C.M.A. 22, 36 C.M.R. 178(1966). See also United States v. Martin, 16 U.S.C.M.A.531, 37 C.M.R.151 (1967).

[227] 16 U.S.C.M.A. 20, 36 C.M.R.176(1966).

[228] 15 U.S.C.M.A. 76, 35 C.M.R. 48(1964).

[229] 16 U.S.C.M.A.226, 36 C.M.R. 382(1966). See also United States v. Stegar, No. 19,681, 16 U.S.C.M.A.___, 37 C.M.R. ___(24 March 1967).

[230] 12 U.S.C.M.A. 423, 31 C.M.R. 9(1961). See also United States v. Bays, 11 U.S.C.M.A. 767, 29 C.M.R.583(1960);United States v. Armstrong, 4 U.S.C.M.A.248, 15 C.M.R.248(1954).

prosecution to rebut defense evidence that the accused was mentally incapable of exercising volition in making certain pretrial statements by presenting evidence that the accused had previously declined to make a statement and had requested counsel.[231] And in United States v. Kemp,[232] the trial counsel was not even permitted to counter the defense's cross examination by showing that the reason government psychiatrists were unable to formulate an opinion as to the accused's sanity was due to the accused's refusal to talk to them even though he did communicate to defense psychiatrists who opined that he was incapable of premeditating in a homicide case. In this frame of reference it should also be noted that counsel are prohibited from referring to the official character of Technical Manual 8-240 on psychiatry.[233]

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[231] United States v. Kavula, 16 U.S.C.M.A. 468, 37 C.M.R. 88 (1966).
[232] 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).
[233] United States v. Allen, 11 U.S.C.M.A. 539, 29 C.M.R. 355 (1960).

CHAPTER IV.

DUTY TO THE CLIENT

> "It is better to risk saving a guilty
> person than to condemn an innocent one."
> -Voltaire, *Zadig*, ch.6

A. ASSIGNMENT AS COUNSEL

1. COMMENCEMENT AND CHARACTERISTICS OF RELATIONSHIP

The Rules-

Canon 4:

> A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

Canon 35:

> A lawyer's responsibilities and qualifications are individual. His relation to his client should be personal and his responsibility should be directto his client.

The Case Law-

When defense counsel enters upon the defense of his client in a contested case, he like the combatant must use the weapons and practices that are available to him. Agreement with his adversary to the contrary is never open to him unless he considers it to be to his client's advantage.[234] He is not an officer of the court in the same sense that pertains to the law officer. His primary duty is to serve his client. In a litigated case it means service to his client alone and not in any part to his government on matters relative to that case. In criminal litigation he can serve no master but client; however, his client employs him together with his professional honor. The ethics of his profession are part of his honor.[235]

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[234] United States v. Horne, 9 U.S.C.M.A.601, 26 C.M.R. 381 (1958); ACM [illegible]-57-01656, Vincent, 24 C.M.R. 506, 509 (1957).

[235] See Stayton, *Cum Honore Officium*, 19 Texas Bar Journal 765 (1956); Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951).

Article 27(a) of the Code provides that the convening authority shall appoint a trial counsel and a defense counsel together with such assistants as he deems necessary or appropriate for each general and special court-martial.[236] Until such time as they are assigned to a specific case, counsel are government employees with the convening authority of their organization as their client.

Attorneys in unit legal offices, especially those rendering legal assistance, must use care to ensure that an attorney-client relationship as to criminal matters is not inadvertently established. Army regulations[237] and policy in the Naval Service prohibit legal assistance officers from giving advice where the subject matter is, or will be, the subject of a court-martial action. However, if in fact, an attorney-client relationship was formulated, such regulations cannot operate to nullify that relationship.[238]

The fundamental requirements for the creation of the attorney-client relationship are that the attorney be accepted as such by the client and that the attorney not expressly refuse to accept the relationship when in consultation with the client.[239] There is more to creating the relationship of attorney and client than the mere publication of an order of appointment. The relationship is personal and privileged. It involves confidence, trust and cooperation and an accused is entitled to protest and request the appointment of other counsel if he has just cause for complaint against the appointee such as incompetence or hostility.[240]

Military personnel on active duty or persons employed by the armed forces are not permitted to solicit or accept fees of any kind from an accused as reim-

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236. See also MCM, 1951, par. 6 a.
237. Army Reg. No. 608-50, para.1(28Apr.1965); JAGAA Bull No.1965-3A, para.VJ(4Mar.1965).
238. See United States v. McCluskey, 6 U.S.C.M.A.545, 20 C.M.R.261,267,n.1(1955).
239. United States v. Slamski, 11 U.S.C.M.A.74, 28 C.M.R.298 (1959).
240. United States v. Miller, 7 U.S.C.M.A. 23, 21 C.M.R. 149 (1956).

bursement for acting as his counsel before a court-martial or before any of the appellate agencies concerned with the administration of justice under the Code.[241]

2. TERMINATION AND WITHDRAWAL

The Rule-

a. Canon 44:

> The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer.

The Case Law-

Dismissal, separation, or retirement from the service of an appointed counsel automatically relieves him from the court-martial to which he has been appointed and another counsel must be appointed unless the appointing order already specifies other counsel competent to act in his stead.[242]

The termination of an attorney client relationship does not terminate a defense counsel's duty to abstain from taking any action in the proceedings contrary to the accused's interests. Accordingly, where an accused was represented by one defense counsel at the pretrial investigation and by another at the trial, it was prejudicial error for the pretrial defense counsel to prepare, at the suggestion of the staff judge advocate, a memorandum of the expected testimony against the accused, which was forwarded to the convening authority for use by the trial counsel.[243]

The duty of a military defense counsel to advise the accused properly does not end with the trial. Thereafter, if a conviction has resulted, the defense

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[241] MCM, 1951, para. 48 a; 18 U.S.C. § 203 (1964).

[242] See CM 357972, McCarthy, 7 C.M.R. 329 (1953).

[243] United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234(1955) citing Canons 6 and 37.

counsel is ethically obligated to give the accused as much information as possible concerning his appellate rights so that he can make an intelligent decision in regard to counsel and further litigation on appeal. It has been held improper for the defense counsel to advise the defendant what he had to lose and not what he had to gain by appellate defense representation and to say that there was little that appellate defense counsel could do in view of the accused's guilty plea at trial.[244]

Furthermore, with some remote exceptions, it is unethical for an attorney whose relationship with the accused has been terminated to take a position opposed to his former client even though that position may not actually involve a divulging of attorney-client confidences. Bad faith is not the test of inconsistent advocacy. It is enough to envoke the doctrine of general prejudice that counsel takes any position substantially adverse to an active advocacy of his former client.[245] Accordingly, a former defense counsel sitting as a member of the base prisoner disposition board may not vote against his former client's expressed desire to attend a retraining group.[246] Nor may he conduct a post trial interview of the accused and then recommend approval of the sentence adjudged by the court-martial without suspension of the punitive discharge imposed because he felt that the accused was not fit for rehabilitation even though the accused desired that the discharge be suspended.[247] Nor may the trial counsel conduct such a post trial interview of the accused.[248] This focuses our attention on the next area for our consideration: Conflict of Interest.

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[244] United States v. Darring, 9 U.S.C.M.A.651, 26 C.M.R.431(1958). *But see* United States v. Harrison, 9 U.S.C.M.A. 731, 26 C.M.R.511(1958).

[245] ACM 18593, Clemens, 34 C.M.R.778(1963),*pet.denied*,15 U.S.C.M.A. 661, 34 C.M.R. 480 (1964).

[246] *Ibid*.

[247] ACM 8270, Bryant, 16 C.M.R. 747 (1954).

[248] United States v. Metz, 16 U.S.C.M.A.140, 36 C.M.R.296 (1966).

B. CONFLICTING INTERESTS

The Rules-

a. The Code, art. 27 (a):

> No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel or unless expressly requested by the accused, as defense counsel in the same case.
> No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution.

b. The Manual (paras. 44b, 46b and 6a):

> Whenever it appears to the court or to the trial counsel or defense counsel that any member of their respective staffs named in the appointing order is disqualified or unable properly and promptly to perform his duties for any reason including unfitness, misconduct, bias, prejudice, hostility, previous connection with the same case or lack of required legal qualifications, a report of the facts should be made at once to the convening authority for his appropriate action.

c . The Manual (para 48g):

> It is the defense counsel's duty to disclose to the accused any interest he may have in connection with the case and any ground of possible disqualification.
> When a defense counsel is designated to defend two or more co-accused in a joint or common trial, he should advise them of any conflicting interests in the conduct of their defense which would in his opinion, warrant a request on the part of any of the accused for other counsel.

d. Canon 6:

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances in or connection with the controversy, which might influence the client in the selection of counsel.
> It is unprofessional to represent conclicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

e. Trial Code 5(a):

> Since a trial is by nature an adversary proceeding a trial lawyer cannot represent conflicting interests.

The Case Law

Some commentators are of the opinion that the exception in Canon 6 permitting the representation of conflicting interests by express consent of all concerned after a full disclosure of the facts was not meant to apply in criminal cases.[249] Note that the Trial Code flatly prohibits representation of conflicting interests and the Manual implies that defense counsel should recommend that another counsel be obtained in such circumstances.

One of the fundamental rights of an accused in a criminal prosecution is his right to counsel. The defense counsel must not only be qualified, but he must also represent his client with undivided loyalty.[250] The prohibition against the representation of conflicting interests is so strong that despite the unquestioned purity of defense counsel's motives, any equivocal conduct on his part must be regarded as being antagonistic to the best interests of his client.[251] The fact that a defense lawyer for the accused in the present case previously acted as defense counsel in a prior case for a Government witness now being called against the accused does not automatically justify a conclusion that the present accused is being denied effective legal assistance. But it was error for a defense counsel to represent an accused who pleaded guilty and thereafter represented a co-accused who pleaded not guilty to the same offense when the former client became the principal prosecution witness at the trial of the present accused. In such a situation the defense counsel was under an affirmative duty to protect both clients when their interests conflicted and he was placed in a position of

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[249] See Sears, A Professor's Viewpoint-Re-evaluation of the Canons of Professional Ethics, 33 Tenn.L.Rev.149(1966). See also Drinker, Legal Ethics 120(1953).

[250] United States v. Lovett, 7 U.S.C.M.A. 704, 23 C.M.R.168 (1957), citing Canon 6 at 171.

[251] United States v. McClusky, 6 U.S.C.M.A.545,550, 20 C.M.R. 261 (1955).

divided loyalty detrimentally affecting a constitutional right of the present accused.[252] Judge Latimer in his concurring opinion in the cited case pinpointed the issue as being the delicate question of ascertaining whether counsel violated the Canons of Ethics of the American Bar Association by failing to represent his client with undivided fidelity.

As stated by the Court of Military Appeals in this type of divided loyalty case counsel finds himself in the legally precarious position of having to walk the tightrope between safeguarding the interests of the present accused on one hand and retaining the confidences of his prior client on the other.

> Such a rope is too narrow. Such a rope is too long. The possibility of falling is too real. The probability of prejudicing the accused is too great. The basic underlying principle which condemns the representation by an attorney of conflicting interests seeks to achieve as its purpose no more than this--to keep counsel off the tightrope.[253]

The test is not whether counsel could have done more by way of further cross-examination or impeachment of his former client, but whether he did less as a result of his former participation.[254]

The same issue of divided loyalty arises when one defense counsel has been assigned to represent co-accused at a joint trial or trial in common. In the recent case of United States v. Tackett[255] it was held that two accused were denied a fair trial when they were not only tried in common, but were represented by a single appointed defense counsel and the testimony of one accused and the pretrial statement by the other accused, who did not testify, presented defenses which were inconsistent in critical areas. The trial counsel in the Tackett case repeatedly invited the court to compare the one accused's testimony with the other's pretrial statement which had been received into evidence, not-

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[252] United States v. Lovett, 7 U.S.C.M.A.704, 23 C.M.R.168 (1957).
[253] United States v. Thornton, 8 U.S.C.M.A.57, 23 C.M.R.281 (1957).
[254] Id. at 285.
[255] 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966).

withstanding the law officer's instructions that the pretrial statement could only be considered as to the accused who made it. Although trial counsel's improper argument was the precipitating factor in the Tachett reversal and the defense counsel had made an unsuccessful pretrial attempt to obtain a severance of the two cases, the defense counsel still had the obligation when his multiple clients had inconsistent theories of defense to so advise his clients so that another counsel might be assigned for one of them.[256]

Similarly, a clear conflict of interest is shown when during the presentencing procedures, after guilty pleas, a defense counsel representing two accused urges that one is more culpable than the other since he had been the leader in the offense and counsel suggests that the non leader be given a lighter sentence. Defense counsel representing co-accused cannot sacrifice one for the other.[257]

No conflict of interest is shown, however, if the defense counsel serves the charges on the accused provided that he does not otherwise participate in the government's case. The mere serving of charges on the accused is clearly an administrative clerical act that does not constitute acting for the government or prosecution. While responsibility for the service of charges is on the trial counsel, his ethical responsibilities require that he go through defense counsel when contacting the accused. It follows that acceptance of service of

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[256] But see in this area of conflicting representation at trial United States v. Young, 10 U.S.C.M.A.97, 27 C.M.R.171(1959) where the Court of Military Appeals held over dissent of Ferguson,J. that there was no conflict of interest where the defense counsel in an assault with a dangerous weapon case argued that one of the co-accused he represented was guilty only of assault and battery but said that the defense could not deny that the other accused did the cutting charged. The majority held that the defense counsel was merely acknowledging indisputable evidence in trying to do his best for both accused and did not want to alienate the court as to the sentence. See also ACM 16999, Melton, 30 C.M.R. 796 (1960), pet. denied, 12 U.S.C.M.A. 734, 30 C.M.R. 417 (1961).

[257] United States v. Fayler, 9 U.S.C.M.A. 547, 26 C.M.R. 327 (1958)

charges from trial counsel by the defense counsel and his subsequent service of them on his client does not amount to participation on behalf of the prosecution. Further, even if the trial defense counsel served the charges on the accused prior to his appointment as defense counsel, that act does not constitute a violation of article 27(a) of the Code nor preclude his subsequent assignment as defense counsel.[258]

Decisions barring conflicting representation by trial counsel have also been handed down by the courts. Once an attorney-client relationship has been established with the accused, even inadvertently as a result of general advice concerning the case, the attorney involved cannot later serve as trial counsel at the trial.[259] Also defense counsel at the original trial cannot serve as the trial counsel at a rehearing[260] or at the trial of a co-accused.[261] Nor may the trial counsel prepare the staff judge advocate's post trial review of the case.[262] Article 6(c) of the Code prohibits persons who act in one capacity in any case from thereafter performing duties in an inconsistent capacity for the reviewing authority in the same case. The words "same case" are not limited to the specific case against a named accused but extend to proceedings against others for the same or closely related offenses which provide a frame of reference tending to influence his participation in the subsequent review.[263]

However, the accuser is not automatically barred from serving as trial counsel.[264] This duality of function does not reflect the preferred policy how-

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[258] CM 412123, Roberson, 35 C.M.R. 554 (1965).

[259] ACM 9225, Brownell, 17 C.M.R. 741 (1954).

[260] ACM 5329, Pace, 5 C.M.R. 610 (1952).

[261] ACM 4612, Homan, 6 C.M.R. 504(1952);ACM 5329, Pace, supra note 260.

[262] United States v. Hightower, 5 U.S.C.M.A.365, 18 C.M.R.9 (1955).

[263] Ibid.

[264] United States v. Lee, 1 U.S.C.M.A.212, 2 C.M.R. 118(1952); United States v. Smith, 13 U.S.C.M.A.553, 33 C.M.R.85(1963)(dictum); United States v. Hayes, 7 U.S.C.M.A.477, 22 C.M.R.267(1957)(dictum).

ever and the accuser would be ineligible to so serve if he is in fact biased, prejudiced or hostile even though these qualities may derive from his accusation.[265] Trial counsel is not disqualified by reason of that fact that in his capacity as unit legal officer, he had suggested an investigation of the accused but did not participate therein.[266]

Nor is appointed trial counsel disqualified from serving even though he had previously acted as counsel for the government[267] or legal adviser to the investigating officer at a pretrial investigation;[268] as chief of military jusrice in the office of the staff judge advocate to the convening authority;[269] or as staff judge advocate of a neighboring command and had advised the pretrial investigating officer.[270]

Paragraph 64 of the Manual provides that a counsel who has an official function to perform requiring him to ascertain the nature of evidence which he is, or will be required, to present to a court-martial, does not fall within the prescription of article 27(a) of the Code which prohibits a person who has acted as investigating officer from subsequently acting as counsel in the same case.[271] Counsel are thus authorized to conduct their own investigations,[272] interview witnesses, and request other commands to promptly forward information available thereat regarding the charges.[273]

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[265] United States v. Lee, supra note 264.

[266] United States v. Whitacre, 12 U.S.C.M.A.345, 30 C.M.R. 345 (1961).

[267] United States v. Weaver, 13 U.S.C.M.A.147, 32 C.M.R.147(1962).

[268] United States v. Young, 13 U.S.C.M.A.134, 32 C.M.R.134 (1962). In this case the Court of Military Appeals stated at 139 that questions of conflicts of interest are resolved by adherence to the Canons of Ethics.

[269] United States v. Erb, 12 U.S.C.M.A.524, 31 C.M.R.110 (1961).

[270] United States v. Hayes, 7 U.S.C.M.A. 477, 22 C.M.R. 267 (1957).

[271] United States v. Schreiber, 5 U.S.C.M.A.602, 18 C.M.R.226 (1955). NCM 66 1258, Calvino, 21 February 1967.

[272] United States v. Patrick, 8 U.S.C.M.A.212, 24 C.M.R.22 (1957); ACM 18170, Rozema, 33 C.M.R.694,703, pet.denied,14 U.S.C.M.A.671, 33 C.M.R. 436 (1963).

[273] ACM 19131, Grundig, 35 C.M.R.842, pet. denied, 15 U.S.C.M.A.683, 35 C.M.R. 478 (1965).

It is not desirable that the senior legal officer on the staff of the convening authority act as trial counsel since it is possible that he will be regarded as speaking for the convening authority and even when it is clear that he speaks only for himself, it is from the vantage point of an official staff position and with special authority. His telling the court members that it is their duty to adjudge a punitive discharge closely approaches unfair argument.[274] In addition, under certain circumstances, it could be questionable to appoint the staff judge advocate as trial counsel and one of his subordinates as defense counsel. It is possible that the official relationship between a subordinate and his supervisory superior might adversely affect the freedom of action of the subordinate and seriouly circumscribe his professional judgment.[275]

Taking an overall view it is seen that the question of disqualification of trial counsel due to conflicting representation is centered on the critical inquiry of whether there is apossibility that the accused might be prejudiced by the presence of a personal interest in the outcome of the case on the part of the prosecutor, or the latter's possession of privileged information or an intimate knowledge of the facts by reason of a professional relationship with the accused.

In this area of conflicting interests the Court of Military Appeals has made its position clear in disapproval of the older, now outmoded military practice where the trial counsel, defense counsel, law officer and staff judge advocate

> All happily employed under one roof, perhaps in a single room - not infrequently settled the fate of an accused person, in what was even then considered an adversary proceeding, amid the cozy comforts of an officers' mess.... Under the Uniform Code, the filing, investigation and referral of

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[274] CGCM S-21700, Moore, 35 C.M.R. 683 (1964).

[275] See United States v. Hayes, 7 U.S.C.M.A. 477, 22 C.M.R. 267(1957). <u>But see</u> CGCM S-21700, Moore, <u>supra</u> note 274.

general court-martial charges are parts of no game; neither do they constitute steps in the paternalistic imposition of sanctions for the violation of club rules. Instead, these and related procedures, constitute the elements of that which is a juristic event of substantial gravity - one *demanding the very highest sort of professional responsibility and conduct from all attorneys involved*.[276]

C. CONFIDENTIAL COMMUNICATIONS

1. PRESERVATION

The Rules-

a. The Manual (para. 48g):

> It is the duty of the defense counsel to represent the accused with undivided fidelity and not to divulge his secrets or confidence.

b. Canons 37 and 6:

> It is the duty of a lawyer to preserve his clients's confidences. This duty outlaws the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.
>
> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed.

c. Trial Code 5(b) and 18(a):

> It is the duty of a lawyer to preserve his client's confidences regardless of fear, threat or imposition of punishment and this duty outlasts the lawyer's employment. The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of employment from others in matters adversely affecting any interests of the former client and concerning which he has acquired confidential information, unless he obtains the consent of all concerned.

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[276] United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234 at 241 (1955)(Emphasis added).

The Case Law-

It is settled law in the Court of Military Appeals that since a lawyer is bound by professional duty to avoid divulgence of a client's confidences to the client's disadvantage, doubts concerning equivocal or apparently inconsistent conduct on the part of the counsel must be resolved against him and be regarded as having been antagonistic to the best interests of his client. This rule stands as a rigid - perhaps even a dogmatic one. It exists not only for the purpose of circumventing the malfeasance of the dishonest practitioner, but also to prevent the upright lawyer from placing himself in a position that requires him to choose between conflicting loyalties. Regardless of the purity of his motives, it is demanded that the lawyer avoid the very appearance of wrongdoing with regard to the privileged relationship. No rule in the ethics of the legal profession is better established nor more rigorously enforced.[277]

The attorney-client privilege is one of the oldest and soundest known to the common law. It exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his counsel safe from the fear that his confidences will return to haunt him. The rationale for such privilege is to establish that rapport of the counsel with his client which will enable the former to secure all the information essential for him to represent his client adequately.[278]

The recognition of the attorney-client privilege by the Court of Military Appeals is not, to use its term, "Juristic sport."[279] It is bottomed on article 27 (a) of the Code which proscribes conflicting representation by counsel and that mandate is implemented by paragraph 151<u>b</u>(2) of the Manual which supports

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277. United States v. Mc Clusky, 6 U.S.C.M.A.545, 20 C.M.R. 261 (1955).

278. United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234(1955) citing Canons 6 and 37; United States v. Farrelli, 4 U.S.C.M.A. 276,15 C.M.R.276(1954).

279. <u>Id</u>. at 266.

the basic tenent of this present thesis that counsel before courts-martial, even if they are not certified lawyers, are subject to the ethics of the legal profession:

> ...Military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge are attorneys and the accused is a client, with respect to the client and attorney privilege.[280]

The Court of Military Appeals has adopted the Wigmore prerequisites for the establishment of the attorney-client privilege with regard to confidential communications:

> (1) Where legal advice of any kind is sought
> (2) from a professional legal adviser in his capacity as such
> (3) the communications relating to that purpose,
> (4) made in confidence
> (5) by the client,
> (6) are at his instance permanently protected
> (7) from disclosure by himself or by the legal adviser,
> (8) except the protection be waived.[281]

Further, the Court of Military Appeals has adopted the Wigmore view that the attorney-client privilege may not be defeated by an attorney's voluntary divulgence of facts or documents to an opposing party if that disclosure was beyond his authority, either express or implied, from his client.[282] Although it may be argued that an accused must assume the risk of disloyalty on the part of an attorney whom he accepted to represent him, the Court will not reward perfidious conduct on the part of a faithless counsel.

Loyalty to the Court does not merely consist in respect for the judicial

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[280] See also United States v. Gandy, 9 U.S.C.M.A.355, 26 C.M.R.135,141n.2 (1958) to the same effect.

[281] Wigmore, Evidence, § 2292 (3d ed.1940).(Italics omitted).

[282] See United States v. Marrelli, 4 U.S.C.M.A. 276, 15 C.M.R. 276 (1954).

office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by a client to his attorney in the latter's professional capacity.[283]

Accordingly, it has been held to be a violation of the privilege against disclosure of confidential communications where an assistant staff judge advocate gave the accused advice relative to his marital problems and then helped to prepare his prosecution for bigamy[284] or where the trial counsel who has previously advised the accused concerning prior fund shortages, brought this matter out on cross examination.[285] Receipt of a grant of immunity does not waive the privilege.[286]

The privilege, of course, does not apply when the attorney-client discussions take place in the presence of a third party who is not the agent of either party,[287] where the client gives counsel information to relay to others[288] or as to collateral matters learned by the counsel prior to the existence of the attorney-client relationship.[289]

2. WHEN DISCLOSURE IS PROPER

The Rules-

a. The Manual (para. 151b(2)):

> Communications between a client and his attorney are privileged unless such communications clearly contemplate the commission of a crime - for instance, perjury or subornation of perjury.

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[283] Opinion No. 287, ABA, Opinions of the Committee Professional Ethics and Grievances 609,614 (1957).

[284] United States v. Mc Clusky, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955).

[285] United States v. Turley, 8 U.S.C.M.A. 262, 24 C.M.R. 72 (1957).

[286] United States v. Fair, 2 U.S.C.M.A. 521, 10 C.M.R. 19 (1953).

[287] United States v. McClusky, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955).

[288] United States v. Buck, 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958).

[289] United States v. Gandy, 9 U.S.C.M.A. 355, 26 C.M.R. 135 (1958).

b. Canon 37 and Trial Code 5(c):

> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

The Case Law-

An attorney may be compelled to testify concerning a cliental confidence received in connection with a projected crime.[290] The social interest favoring full disclosure by clients to counsel is inoperative to shield with secrecy confidences made for the purpose of seeking advice as to how best to commit a contemplated offense.

Similarly, a defense counsel accused by his client of inadequate representation or breach of duty has the right to counter the accusations by revealing matters within the attorney-client relationship.[291]

D. SUPPORTING A CLIENT'S CAUSE

1. HOW FAR AN ATTORNEY SHOULD GO IN REPRESENTING HIS CLIENT

The Rules-

a. The Manual (48c and 48f):

> A person acting as counsel for the accused will perform such duties as usually devolve upon the counsel for a defendant before a civil court in a criminal case. He will guard the interests of the accused by all honorable and legitmate means known to the law.
> Defense counsel should endeavor to obtain full knowledge of all facts of the case before advising the accused and he is bound to give the accused his candid opinion of the merits of the case.

b/ Canons 15, 8 and 24:

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[290] See United States v. Farrelli, 4 U.S.C.M.A.276, 15 C.M.R.276(1954). See also Noonan, The Purposes of Advocacy and the Limits of Confidentiality, 64 Mich. L. Rev. 1485,1489 (1966).

[291] United States v. Allen, 8 U.S.C.M.A. 504, 25 C.M.R.8(1957); ACM 13470, Harris, 24 C.M.R.698(1957), aff'd, 9U.S.C.M.A.493, 26 C.M.R.273 (1958) citing Canon 37 at p.709 in the Board of Review decision; Opinion No.19, ABA, Opinions of the Committee on Professional Ethics and Grievances 95 (1957).

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy of defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance.

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

c. Trial Code 15(a), 18(a) and 13:

A lawyer should thoroughly investigate and marshall the facts. It is both the right and duty of a lawyer fully and properly to present his client's cause and to insist on an opportunity to do so. He should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate case record is made. In this regard, he should not be deterred by any fear of judicial displeasure or punishment.

The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel

> in all matters not directly affecting the merits of the cause or prejudicing the client's rights.

The Case Law-

The common denominator applicable to both the trial counsel and defense counsel is that both must use only "fair and honorable means" at the trial of criminal cases. The ethical obligation of the trial counsel differs from that of the defense counsel in only one material respect: that is the duty of the trial counsel to disclose information in his possession which may be of assistance to the defendant.[292] This is where the difference in partisanship is most telling. The trial counsel cannot knowingly permit the innocent to be convicted; he cannot suppress evidence[293] or knowingly misrepresent the nature of evidence before the court.[294] But the defense counsel has no duty to produce evidence helpful to the prosecution and the ethics of the profession require that he do all in his power within the framework of ethical representation to get his client acquitted. However, neither the presumption of the defendant's innocence nor the government's high burden of proof beyond a reasonable doubt warrants the defense counsel to act with anything other than honor and fairness. The defense counsel is under obligation to defend his client with all his skill and energy, but he also has moral and ethical obligations to the court embodied in the Canons of Ethics of his profession. His obligation is to achieve a fair trial, not to see that his client is acquitted regardless of the merits.[295] It is just as unjust to acquit the guilty through improper means as it is to use such means to convict the innocent.[296]

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[292] See Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 Am.Crim.L.Q., 23 at 24(1966); Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 Mich. L.Rev. 1493 (1966).

[293] Giles v. Maryland, 87 Sup. Ct. 793 (1967).

[294] Miller v. Pate, 87 Sup. Ct. 785 (1967).

[295] See Mitchell v. United States, 259 F.2d 787,792(D.C.Cir.)*cert.denied*, 358 U.S. 850 (1958).

[296] See Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 Am.Crim.L.Q. 23 at 24 (1966).

The outer limits are clear. On the one hand, the advocate may not lie on behalf of his client. He may refuse to answer based on the attorney-client privilege but he cannot lie[297] or permit his witness to paint a false picture in extenuation and mitigation.[298] The other end of the scale is just as clear. Defense counsel should not call the court's attention to prior convictions of the accused which are unknown to the court but would serve to increase the permissible punishment against the accused.[299] In effect, the objective of safe-guarding the defendant's rights cuts across and limits the truth discovering purpose of a criminal court-martial.

Accordingly, it is ethically proper for the defense counsel to refrain from disclosing to the court factual data against his client but he may not with-hold information concerning the applicable law. The issue arises frequently in both criminal and civil cases. The dean of contract law in the United States, Samuel Williston, learned of a fact extremely damaging to his client's cause during a civil case. When the judge rendered his opinion in favor of Williston's client it was obvious that the judge was not aware of the damaging information. Williston, remained silent and did not reveal his personal information to the judge. He was convinced that his duty to his client commanded his silence and so it did.[300]

The problem lies in the twilight zone - that indefinite grey area where the question inevitable arises - how far may an advocate ethically go? Three areas of common occurrence present very real and serious considerations with respect to the ethical responsibilities of the advocate:

(a) Is it proper to cross-examine for the purpose of discrediting the

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[297] Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy"*, 4 Stan. L. Rev. 349(1952). *But see* Curtis, *The Ethics of Advocacy*, 4 Stan.L.Rev. 3(1951).

[298] CM 411402, Stevenson, 34 C.M.R. 655(1964)*pet.denied*,15 U.S.C.M.A. 670, 35 C.M.R. 478 (1964).

[299] ACM S-3923, Boese, 6 C.M.R. 608 (1952).

[300] Williston, Life and Law 271 (1940).

reliability or credibility of an adverse witness when it is known he is telling the truth?

(b) Is it proper to put a witness on the stand when it is known he will commit perjury?

(c) Is it proper to give a client legal advice which, you have reason to believe, will tempt him to commit perjury?

An excellent ethical solution to these problem areas applicable to both civilian and military advocates has been presented by Bress:

> Even though defense attorney may know that a government witness is telling the truth, it is nevertheless entirely proper for him to cross-examine for the purpose of showing the limited weight to be given to the testimony of that witness. The justification for this is that the defendant is entitled to have the government prove its case beyond a reasonable doubt, notwithstanding the defense attorney's own belief of his client's guilt. There is nothing inconsistent between that situation, putting the government to its proof, and the high obligation owed by defense counsel to the court. But it is an entirely different matter for defense counsel to present evidence known by him to be false. The defense attorney must always be in charge of his case, and though he may consult with the defendant, the running of the case must be controlled by counsel. Under no circumstances should such consultation between attorney and client result in the production of any witness who will give perjured testimony. Nor should defense counsel permit his own client, the defendant, to perjure himself. He should vigorously try to dissuade his client from such action and if the client insists upon testifying falsely, he should move to withdraw from the case without revealing any confidences received from the client. If withdrawal is not permitted, then the defense counsel should limit his examination of the defendant who will give the perjured testimony to the simple question: 'You have a statement to make to the court and jury—will you now make it.' And he should not argue the truth of that statement in his argument to the jury, because to do so would be a fraud upon the court. He may, nevertheless, argue the case on the sufficiency of the government's testimony and the other evidence offered by the defense, exclusive of the defendant's own perjured testimony.[301]

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[301] Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 Am. Crim.L.Q. 23 at 24(1966). *Contra*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer : The Three Hardest Questions*, 64 Mich.L.Rev. 1469 (1966).

In addition, a defense counsel should not "frame" a factual defense in any case and should not plant the seeds of falsehood in the mind of his client.[302]

Defense counsel can ethically insist that character witnesses be called to appear at the trial despite the government's offer to stipulate the testimony[303] and may insist that both he and the accused be present at the taking of a deposition despite the distance and expense involved.[304]

The defense counsel has the responsibility to see that the rights of the accused are fully protected at all times and to present all pertinent evidence readily available.[305] However, having once received expert opinion that the accused was legally sane, the defense counsel is not obligated to "shop" for psychiatric evidence in an attempt to find a psychiatrist who would testify that the accused was of an unsound mind.[306]

2. COUNSEL AS A WITNESS

The Rules-

a. Canon 19:

> When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

b. Trial Code 11:

> When a lawyer knows, prior to trial, that he will be a necessary witness, other than as to merely formal matters such as identification or custody of a document or the like, he should not conduct the trial. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdrawal from the conduct of the trial, a lawyer should not argue the credibility of his own testimony.

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302. Johns v. Smyth, 176 F.Supp. 949 (E.D.Va.1959).
303. United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R.379(1964).
304. United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R.244 (1960).
305. See United States v. Mc Farlane, 8 U.S.C.M.A. 96,23 C.M.R.320(1957).
306. United States v. Wimberly, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

The Case Law-

The fact that a person is counsel for one of the parties in a criminal case does not disqualify him from being called as a witness for either side. He is competent to testify as to any competent or relevant facts except those which have come to his knowledge from confidential communications with his client.[307]

However, for ethical reasons the practice is highly undesirable and looked upon with complete disfavor by the Court of Military Appeals. Unless his testimony involves purely formal matters that are essential to the ends of justice, testimony by a lawyer for his client is improper under Canon 19 because it unfairly throws his credibility as an officer of the court into the balance.[308] The function of an advocate and a witness should be disassociated. The court members naturally give the evidence related by counsel from the stand far greater weight than that of the ordinary witness.[309]

Accordingly, although counsel is competent to take the stand to establish a chain of custody as to an item of physical evidence which had been delivered to him, better practice dictates that counsel should forsee the ethical problem and arrange for some other person to receive the item and act as custodian.[310]

3. INTERVIEWING WITNESSES

The Rules-

a. The Code, art. 46:

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[307] United States v. Mc Cants, 10 U.S.C.M.A.346, 27 C.M.R.420 (1959)(rev'd on other grounds); United States v. Buck, 9 U.S.C.M.A. 290, 26 C.M.R.70 (1958).

[308] United States v. Lewis, 16 U.S.C.M.A.145, 36 C.M.R.301(1966); United States v. Stone, 13 U.S.C.M.A. 52, 32 C.M.R. 52(1962).

[309] Robinson v. United States, 32 F. 2d 505 (8th Cir. 1928).

[310] United States v. Whitacre, 12 U.S.C.M.A. 345, 30 C.M.R. 345(1961).

> The trial counsel, defense counsel and the court-martial shall have equal opportunity to obtain witnesses.

b. The Manual (para. 42c and 48p):

> Counsel may properly interview any witness or prospective witness for the opposing side (except the accused) in any case without the consent of opposing counsel or the accused. In interviewing a witness, counsel should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth when appearing as a witness at the trial.
> Ample opportunity will be given the accused and his counsel to prepare the defence, including opportunities to interview each other and any other person.

c. Canon 39:

> A lawyer may properly interview any witness or prospective witness for the opposing side in any criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand.

d. Trial Code 15(a):

> The lawyer may properly interview any witness or prospective witness for the opposing side except the accused in any criminal action without the consent of the opposing counsel or party for a witness does not "belong" to any party. He should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. He should avoid taking any action calculated to secrete a witness. However, except when legally required, it is not his duty to disclose any evidence or the identity of any witness.

The Case Law-

May an attorney or other person ethically advise a prospective court-martial witness (who is not his client), but who may have an inculpatory relationship to the case, to claim his rights under Article 31 and refuse to testify? The answer in the 9th Circuit is that such action is a crime if a corrupt motive is involved and the author submits that the ethical answer should be NO in court-martial practice as to attorneys who seek to silence witnesses against their

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clients. In Cole v. United States[311] a nonlawyer defendant was convicted under 18 U.S.C. § 1503 (1964) of obstructing the due administration of justice by attempting to persuade a witness not to testify before a federal grand jury. The defendant claimed that he merely induced the witness to claim his constitutional privilege. On appeal, the circuit court held that the lawfulness of the act of the witness did not wipe out the criminality of the defendant's inducement which was prompted by a corrupt motive to protect himself. The privilege belongs to the witness who has a right to claim it, but another may not obstruct the administration of justice by wrongfully urging the witness to claim it.

The same rationale should apply to attorneys before courts-martial. The attorney has the right to advise only those who are his clients to invoke the privileges of article 31, no other. The Cole case stands as good law and a possible warning to overzealous advocates who would suppress evidence.

Directly contrary to the above views, stand Informal Decisions No. C-498[312] and 575[313] of the American Bar Association Committee on Professional Ethics which held that it is not unethical for a civilian defense counsel in a military general court-martial case to admonish a witness for the prosecution who was a collateral actor in the offense that his testimony, sought to be elicited by the prosecution against the counsel's client, might tend to incriminate him. Decision No. 575 was an amplification of No. 498 and held that the action approved in the ealier opinion would not establish an attorney-client relationship, that such action did not violate the spirit of Canons 15, 22 and 39 and that such warning was not in the sole province of the law officer during trial or in

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[311] 329 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954 (1964). Contra, Herron v. United States, 28 F.2d 122 (N.D.Cal.1928).

[312] Informal Decision No. C-498, ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

[313] Informal Decision No. 575, ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

the province of trial counsel prior to trial.

In the opinion of the author of the present paper, the informal decisions cited above do not reflect the correct ethical principle. What is worse, they hedge. The original question postulated in Decision No. C-498 was whether the defense counsel would be authorized to advise the witness for the prosecution that, if he desired, he could refuse to testify against the defense counsel's client on the ground that the testimony may tend to incriminate him. The decision did not answer that question when it held that counsel could tell the witness that the testimony sought by the prosecution may tend to incriminate him.

This issue was raised again in Decision No. 575 when the person questioning the Committee asked point blank:

> Does Informal Opinion sic 498 mean that the defense attorney may in situations where proper to do so, warn a prosecution witness that he need not testify at all in the criminal action, or does it mean that the witness may be properly warned only that he need not testify as to those matters which may tend to incriminate him? The former does not seem to be the law.

In answer the Committee replied:

> Opinion C-498 is to the effect only, that in situations where proper to do so, the defense lawyer may warn a Witness for the prosecution that his testimony sought to be elicited may tend to incriminate him.

The author submits: (1) the Committees' reply last cited did not answer the specific questions raised; (2) the Committee is now holding, sub-silentio, that it is unethical to warn a prosecution witness that he need not testify at all in the criminal action which is the correct proposition of law as demon-

[illegible]

[illegible]

[illegible]

> [illegible]

[illegible]

> [illegible]

[illegible]

strated by the *Cole* case, *supra*; (3) that the defense counsel has no authority to advise the witness that testimony sought to be elicited by the other side may tend to incriminate him because prior to the pretrial investigation that counsel can only predict, without actually knowing, what the prosecution will ask the witness and is only gratuitously speculating whether the hypothetical questions he formulates may tend to incriminate the witness; further if the witness relates to the defense attorney what preparatory questions the trial counsel has asked him and the defense counsel then advises him that the testimony sought to be elicted may tend to incriminate him, an attorney-client relationship is in fact being established; and that at the pretrial investigation and trial itself, if incriminating questions are asked of the witness while on the stand, the right to refuse to answer is personal to the witness and the defense counsel has no authority to object to the question; (4) the Committee decision in question should be narrowly limited to the effect that the defense lawyer may warn a witness for the prosecution that the answers to certain questions that the *defense* lawyer intends to ask him on cross-examination may be incriminating, if such be the case; (5) defense counsel's duty to *his* client does not permit him to obstruct justice by advising another, not his client, to suppress his testimony even though that other has a legal right to do so; and (6) the informal decisions in question should be withdrawn.

The Court of Military Appeals has not yet decided this issue. Judge Latimer in his dissent in *United States v. Grzegorczyk*,[314] recognized the issue and mentioned that the defense counsel in that case went far beyond the limits of ordinary representation by repeated suggestions in open court to witnesses, whom he had represented at earlier trials for the same offense, that they wrap themselves in the mantle of the article 31 UCMJ privilege against self incrimination.

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[314] 8 U.S.C.M.A. 571, 25 C.M.R. 75 (1958) (dissent).

Apparently appellate review had not yet been completed on the witnesses' trials. Judge Latimer noted, with apparent approval, that the law officer ruled that the defense counsel could not exercise the privilege for the witness. The decision assumes that the defense counsel also advised the witnesses to claim their privilege during a court recess but this action was not improper because the defense counsel had previously represented the witnesses and an attorney-client relationship existed.

As to the accused himself, however, the defense counsel may ethically advise him to talk to a defense psychiatrist and then to invoke his right under article 31 of the Code and refuse to talk to a government psychiatrist even though the practical result is that the only available expert witness at the trial will be the defense expert.[315]

Modern trial practice emphasizes pretrial disclosure of the probable facts. In military practice, the names and addresses of Government witnesses must be endorsed on the charge sheet and a copy thereof given to the accused.[316] No similar obligations are imposed upon the accused as to his prospective witnesses; nor is he required to disclose in advance of trial whether he intends to rely upon an affirmative defense such as alibi or insanity.[317] Moreover, the defense counsel may insist on a private interview if the witness is willing to grant one. Therefore in the light of the Code and Manual provisions regarding equality of access to witnesses, it has been held that it is beyond the authority of an agent of the United States government to interpose himself between a witness and an interviewing counsel by requiring as a condition for the granting of such

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[315] See United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

[316] MCM, 1951, paras, 29,44h and app.5. See also dissent of Quinn,C.J., in United States v. Enloe, 15 U.S.C.M.A. 256, 35 C.M.R. 228 at 238 (1965)(dissent).

[317] See dissent of Quinn,C.J., in United States v. Enloe, *supra* note 316.

interviews that a designated third party be present.[318] Nor may the government order an accused or his counsel not to communicate with witnesses against him even though these witnesses complain that the accused was bothering them;[319] nor may a law officer preclude defense interviews with prosecution witnesses who have already testified at the trial.[320] As to a witness who is a defendant in a related criminal case, however, trial counsel must go through that witness' defense counsel before questioning him.[321]

Witnesses are not parties and should not be partisans. They do not belong to either side of the controversy. They may be summoned by one or the other or both, but are not retained by either.[322]

Information as to the probable testimony of a witness may be gleaned from a number of sources, but the most direct and generally reliable source is the witness himself. Every experienced trial lawyer knows that sound cross-examination rests upon the bedrock of pretrial preparation. While it may be unnecessary in some cases, and economically or physically impossible in others, effective preparation for trial includes the interview of all prospective witnesses, whether denominated government, defense or nonparty.[323] There is no ethical requirement that counsel interviewing a witness inform that witness which side he represents unless the witness asks.[324]

However, although a witness may be compelled to submit to interrogation

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[318] United States v. Enloe, 15 U.S.C.M.A. 256, 35 C.M.R. 228 (1965).

[319] United States v. Aycock, 15 U.S.C.M.A.158, 35 C.M.R. 130 (1964). See also United States v. Wysong, 9 U.S.C.M.A.249, 26 C.M.R.29 (1958); United States v. DeLauder, 8 U.S.C.M.A.656, 25 C.M.R.160 (1958).

[320] United States v. Strong, 16 U.S.C.M.A.43, 36 C.M.R.199(1966).

[321] Informal Decision No. 249, ABA, Opinions of the Committee on Professional Ethics and Grievances 640 (1957).

[322] See United States v. Enloe, 15 U.S.C.M.A. 256, 35 C.M.R.228 (1965).

[323] See dissent of Quinn,C.J., in United States v. Enloe, 15 U.S.C.M.A. 256, 35 C.M.R. 228 at 237 (1965)(dissent).

[324] Informal Opinion No. 581,ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

of counsel in the taking of a deposition, or in examination at the trial itself, neither counsel nor the court has the authority to compel a witness to submit to an out-of-court interview by the accused or either counsel. Instead witnesses may at their personal election refuse to discuss their prospective testimony with anyone whether it be a law enforcement agent, trial or defense counsel or the accused except when summoned in proper form before an officer or a tribunal empowered by law to require him to testify.[325] Although counsel may advise a witness as to his legal rights concerning interview by the opposing attorney, counsel should not attempt to influence the election of the witness on the matter either way.[326]

In interviewing witnesses or prospective witnesses, counsel must scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth in any degree or to affect his free and untrammeled conduct when appearing at the trial. Intimidating or influencing a witness may give rise to charges under article 134 of the Code.[327] On the other hand advising or instructing a prospective witness concerning the procedures of a trial, his expected demeanor thereat or probable cross-examination is not improper so long as no attempt is made to influence the witness to tell other than the whole truth.[328]

As a matter of fact it is recommended that a prospective witness be told by the counsel calling him that if he is asked whether he has talked with anyone concerning his expected testimony prior to trial, he is to answer honestly to this question as well as to all other questions. Some witnesses, otherwise

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[325] See United States v. Enloe, 15 U.S.C.M.A.256, 35 C.M.R.228,235(1965); ACM 8768,Doyle,17C.M.R.615,640,*pet.denied*,5 U.S.C.M.A.840,17C.M.R.381(1954).

[326] ACM 8768,Doyle,*supra*,note 325 at 641.

[327] ACM 7414, Rossi, 13 C.M.R. 896(1953).

[328] *Cf.*United States v. Slozes, 1U.S.C.M.A.47,1C.M.R.47(1951);NCM281,Dorsett, 14 C.M.R. 475 (1953).

completely truthful, have a tendency to deny having gone over their testimony with anyone prior to trial. It may result from a mistaken idea that it is wrong to discuss his testimony with one of the attorneys prior to trial.[329] If a cross-examining counsel belligerently inquires as to what counsel calling a witness told him to say on the stand, experienced witnesses frequently deflate his sails by replying "Counsel told me to tell the truth, the whole truth and nothing but the truth."

4. RESTRAINING CLIENT FROM IMPROPRIETIES

The Rules-

a. Canon 16:

> A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

b. Canon 29:

> The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.

c. Trial Code 10(d):

> Subject to whatever qualifications may exist by virtue of the confidential privilege that exists between a lawyer and his client, the lawyer should expose without fear before the proper tribunals perjury and any other unethical or dishonest conduct.

The Case Law-

The case of the perjured client or witness. What does the ethical advocate do? Neither trial[330] nor defense counsel may ever, under any circumstances, knowingly present false testimony, or false documents or otherwise participate in a fraud upon the court. This is a rule which is so basic and fundamental

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[329] American Law Student Ass'n., Lawyers' Problems of Conscience 57(1953); Drinker, Legal Ethics 86 (1953).

[330] Napue v. Illinois, 360 U.S.264(1959); Alcorta v. Texas, 355 U.S.28(1957); Mooney v. Holohan, 294 U.S. 103 (1935).

to the integrity of our military system of justice and the legal profession that it can never admit of any exception, under any circumstances.[331]

> Occasionally some naive and inexperienced person lacking adequate training in his profession may challenge this fundamental rule. It takes only a moment's consideration by a mature mind to realize that this is a perversion and prostitution of anhonorable profession. If perjury is a permissible tool for a defense counsel, can we say that it should be denied to the prosecution? ...The lawyer is simultaneously an agent of his client and an officer of the court and he promises to conduct himself not only in accordance with the law, as do all other citizens, but uprightly as well. Uprightly obviously means ethically. Properly understood, the duties of a lawyer to the court can never be in conflict with his duty to his client.[332]

But yet the question remains. What does defense counsel do if the accused insists on exercising his right to testify in his own behalf and then commits perjury? Even if he has forewarning of his client's intent, counsel cannot physically bar him from taking the stand. Conscientious counsel would however have reminded his client that perjury is illegal and might result in his being later prosecuted for that offense if he is not aquitted of the present offense and that an announced intention to commit perjury destroys the attorney-client privilege.[333]

Counsel's consternation at perjured testimony by his client is understandable. If he fails to reveal the same, even in the criminal case, he violates his ethical obligations[334] and his silence might also be misconstrued as an approval of the deception. However, the form of his response to the situation is the critical issue. What he may not due is clear - he may not brand the accused a liar in open court and then and there request to be relieved from the case. An attorney cannot pursue a course of conduct that clashes with his

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[331] Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 Am. Crim.L.Q. 11,12(1966).
[332] *Ibid*.
[333] Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibilities*, 64 Mich. L. Rev. 1493,1496(1966).
[334] Informal Decision No.609, ABA, Informal Opinions of the Committee on Professional Ethics (unpaginated 1966).

obligation to represent his client to the best of his ability.[335] The ethical solution is to make the disclosure to the law officer in an out-of-court hearing.[336]

5. DEFENSE OF ONE KNOWN TO BE GUILTY

The Rules-

a. The Code, art.51(c) (1):

> The accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt.

b. The Manual (para. 48c):

> It is the defense counsel's duty to undertake the defense regardless of his personal opinion as to the guilt of the accused.

c. Canon 5:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

d. Trial Code 3:

> A lawyer should not decline to undertake the defense of a person accused of crime, regardless of his personal or the community's opinion as to the guilt of the accused or the unpopularity of the accused's position, because every person accused of a crime has a right to a fair trial, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. This places a duty of serv-

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335. United States v. Winchester, 12 U.S.C.M.A.74, 30 C.M.R.74(1961) which held that the accused was prejudiced as to the sentence where he pleaded guilty but prior to the findings he testified for a co-accused who had pleaded not guilty and assumed the main blame in an effort to absolve the co-accused. His individual defense counsel then stated in open court that the accused had committed perjury and asked permission to withdraw from the case.

336. See United States v. Winchester, *supra*, note 335. *But cf.* Opinion No. 287, Opinions of the Committee on Professional Ethics and Grievances 609(1957); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich.L.Rev. 1469,1475 (1966).

> ice on the legal profession and, even though a lawyer is not bound to accept particular employment, requests for service in criminal cases should not lightly declined or refused merely on the basis of the lawyer's personal desires, his or public opinion concerning the guilt of the accused, or his repugnance to the crime or to the accused.

<u>The Case Law</u>-

The problem of the guilty client is really no ethical problem at all. The question before the American court-martial is not whether the accused be guilty. It is whether he be shown to be guilty, by legal proof of an offense legally set forth.[337] It is the right of the most degraded human being in a civilized state to a real hearing in his case in a judicial court which can be obtained only through honest and competent advocacy.[338]

The fact must be remembered that under our system of justice, there is a legal presumption that an accused person is innocent until he has been found guilty by the members of the court-martial. The onus is upon the government to establish the guilt of an accused person beyond a reasonable doubt. No man is bound to accuse himself and his advocate must do nothing inconsistent with that fundamental rule.[339]

There is nothing unethical in taking a bad case, defending the guilty or becoming the advocate for a cause personally not believed in. It is ethically neutral.[340] "In a way the practice of law is like free speech. It defends what we hate as well as what we most love."[341]

6. <u>PLEAS</u>

<u>The Rule</u>-

a. The Manual (para. 70<u>a</u>):

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[337] See Drinker, Legal Ethics 143 n. 25 (1953).

[338] NCM S-58-01854, Field, 27C.M.R.863,871(1959); Parry, Seven Lamps of Advocacy 33 (1924).

[339] Orkin, Legal Ethics 110 (1957).

[340] Curtis, It's Your Law 29 (1954).

[341] <u>Id</u>. at 31.

> The accused has a legal and moral right to enter a plea of not guilty even if he knows he is guilty. This is so because his plea of not guilty amounts to nothing more than a statement that he stands upon his right to cast upon the prosecution the burden of proving his alleged guilt.

The Case Law-

Unless the accused unequivocally admits that he is guilty of the charges and specifications to which he pleads guilty, defense counsel cannot permit him to enter such a plea despite the fact that such counsel knows that there is sufficient prosecution evidence to convict his client if he pleads not guilty and he can obtain the benefit of an extremely favorable pretrial agreement. The Court of Military Appeals has held a petitioner's plea of guilt to have been improvidently entered where the accused claimed he had no recollection of the charged offense or of the events surrounding it and that he had signed a pretrial agreement that was untrue on the advice of counsel who believed that he would be returned to duty.[342] An accused's guilty plea will also be set aside if it is based on the defense counsel's incorrect concept of the law involved.[343]

When the accused has entered aplea of not guilty it is improper for defense counsel to thereafter concede away his innocence.[344] Accordingly it is prejudicially erroneous for the defense counsel to concede in his closing argument that the prosecution had successfully proven the accused's guilt.[345]

Such concessions by counsel in effect amount to pleading the accused guilty at the close of the case on the merits. At the very least such improper conduct on the part of counsel demand interrogation of the defendant concerning his agree-

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[342] United States v. Holladay, 16 U.S.C.M.A.373, 36 C.M.R. 529 (1966); United States v. Chancelor, 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1966).

[343] See United States v. Fernengel, 11 U.S.C.M.A535, 29 C.M.R. 351(1960).

[344] United States v. Mitchell, 16 U.S.C.M.A.302,36 C.M.R.458(1966); United States v. Smith, 8 U.S.C.M.A.582,585, 25 C.M.R.86,89 n.2(1958); United States v. Walker, 3 U.S.C.M.A. 355,359, 12 C.M.R. 111,115 (1953).

[345] United States v. Hampton, 16 U.S.C.M.A. 304, 36 C.M.R. 460 (1966).

ment to his counsel's trial tactics as well as an examination by the law officer into the accused's understanding of their meaning and effect as a virtual plea of guilty.[346] Counsel for the accused cannot ethically override his client's desire expressed in open court to plead not guilty and covertly enter in the name of that client another plea, whatever the label, which would shut off the accused's right to plead not guilty.

Nor in a capital case where article 45 (b) of the Code precludes acceptance of a guilty plea may defense counsel's tactics effectively inform the court that had there not been a statutory prohibition, the accused would have judicially confessed to the crime.[347]

The negotiation of a pretrial agreement with the convening authority on behalf of the accused is an authorized procedure which may greatly benefit the accused, but defense counsel should not negotiate such an agreement prior to consulting with the accused.[348]

Counsel's duty to represent the accused does not end with the findings. Remaining for determination is the question of the accused's liberty, property, social standing and in effect his whole future. Negotiation of a favorable pretrial agreement does not transform the trial into an empty ritual nor does it relieve the defense counsel of his duty to appeal as effectively as possible to the conscience of the court to "beat" the pretrial agreement and obtain a more favorable sentence for his client.[349] The court members should not be made aware of the fact that a pretrial agreement was negotiated or that such a negotiation had been attempted.[350]

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[346] United States v. Chancelor, 16 U.S.C.M.A.297, 36 C.M.R. 453 (1966).

[347] United States v. McFarlane, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957).

[348] See concurring opinion of Ferguson, J., in United States v. Hood, 9 U.S.C.M.A. 558, 26 C.M.R. 338,343 (1958).

[349] United States v. Allen, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957); See also United States v. Welker, 8 U.S.C.M.A. 647, 25 C.M.R. 151,153(1958).

[350] See United States v. Lewis, 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966).

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Further, assuming that a proper plea of guilty has been entered and accepted, defense counsel must take care that he does not get carried away with his advocate's oratory and make borderline or inconsistent statements making that plea improvident and requiring that the plea be set aside, thus depriving his client of whatever benefits he stood to gain from the plea.[351] Trial counsel also has an obligation in this regard and should not shrug off borderline statements by his adversary as mere puffing. If it appears that a providency issue might be raised by such statements it is his duty as the "oracle of the law" at a special court-martial to advise the president of the procedures to be followed or to request the law officer at a general court-martial to reinquire if the accused is in truth guilty of the offenses to which he has pleaded guilty and to ensure that he realizes the admissions inherent in his plea and the possible conflict between that plea and the statements later made in court.[352]

7. TECHNICAL DEFENSES

The Rules-

a. The Manual (para. 48 c):

> The defense counsel will guard the interests of the accused by all honorable and legitimate means known to the law.

b. Canon 5:

> Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

c. Trial Code 4 (a):

> Having accepted employment in a criminal case, a lawyer's duty is to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence and to raise all valid defenses.

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[351] See United States v. Hinton, 8 U.S.C.M.A. 39, 23 C.M.R. 263 (1957); United States v. Brey, 14 U.S.C.M.A. 419, 34 C.M.R. 199(1964).

[352] See ACM S-20943, Croft, 33 C.M.R. 856, 861 (1963).

The Case Law-

An attorney has the ethical duty to present to the court all claims and defenses of his client unless he knows them to be false. Although counsel may advise his client not to raise a certain defense because the facts do not support it, the final decision in the matter rests with accused.[353] Accordingly, counsel is honor bound to raise the issue of involuntariness of a confession or the defense of entrapment even though in his professional opinion such action would produce no substantially beneficial result[354] or might be frivolous in the extreme.[355]

Counsel must take every advantage that the law provides to protect his client. Reliance on a technical defense such as the statue of limitations by counsel on behalf of his client is entirely proper and astute preparation by counsel may prove highly advantageous to his client. Consider the interplay between the statute of limitations and a desertion prosecution. The limitation for the filing of charges of desertion is three years, but it is only two years for the lesser included offense of absence without leave.[356] Accordingly, the alert attorney, after a not guilty plea of his client to a desertion charge, filed after two years of the statute has already run, will vigorously contest the intent required for desertion and will slant his argument toward complete acquittal and also toward the lesser included absence without leave and ensure that the law officer instructs relative thereto. Thereafter, in the event that his client is found guilty of the lesser included offense, he may properly raise the two year statute of limitations as to absence without leave offenses to bar the entry of that conviction.[357]

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[353] CM 398074, Oakley, 25 C.M.R. 624 (1958).
[354] Ibid.
[355] United States v. Horne, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958).
[356] UCMJ, art. 43.
[357] United States v. Wiedemann, 16 U.S.C.M.A. 365, 36 C.M.R. 521 (1966); United States v. Cooper, 16 U.S.C.M.A. 390, 37 C.M.R. 10 (1966).

however, akin to the good chess player, the alert defense counsel must weigh carefully the long range consequences of all his tactical moves. In the desertion situation outlined above, he must not get carried away with his plan and permit his client to plead guilty to the lesser included offense of absence without leave because a knowledgeable plea entered after being fully advised of the consequences, can waive the statute of limitations.[358]

E. ARGUMENTS AND PRESENTENCING PROCEDURES

The Rules-

a. The Manual (para. 72 b):

> A reasonable latitude should be allowed counsel in presenting their arguments. Counsel may make a reasonable comment on the evidence and may draw such inferences from the testimony as will support his theory of the case. The testimony, conduct, motives, and evidence of malice on the part of witnesses may, so far as disclosed by the evidence, be commented upon. It is improper to state in an argument any matter of fact as to which there has been no evidence. A party may, however, argue as though the testimony of his own witnesses conclusively established facts related by them.
> The prosecution may not comment upon the failure of the accused to take the witness stand; however, if the accused has testified on the merits with respect to an offense charged, and if he fails in such testimony to deny or explain specific facts of an incriminating nature that the evidence of the prosecution tends to establish with respect to that offense, such failure may be commented upon. When an accused is on trial for a number of offenses and has testified to one or more of them only, no comment can be made on his failure to testify as to the others. Refusal of a witness to answer a proper question may be commented upon.

b. Canon 22 and Trial Code 23 (b):

> It is not candid or fair for the lawyer knowingly in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by conceding or withholding positions in his opening argument upon which his side then intends to rely.

c. Trial Code 20 (c):

A lawyer should never misstate the evidence or state as fact any

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[358] United States v. Troxell, 12 U.S.C.M.A. 6, 30 C.M.R. 6 (1960).

> matter not in evidence, but otherwise has the right to argue in the manner he deems effective , provided his argument is mannerly and not inflammatory.

The Case Law-

ARGUMENT BEFORE FINDINGS

After both sides have rested prior to findings, arguments may be made with counsel for the prosecution making the opening argument and, if any argument is made on behalf of the defense, the closing argument.[359] While some latitude must be permitted counsel, he is required to confine himself to reasonable comment on the issues, the evidence, whatever fair and reasonable inferences may be drawn therefrom and to the arguments of opposing counsel.[360] Subject to these limitations, counsel may with perfect propriety appeal to the court with all the power, force and persuasiveness which his learning,,skill and experience enable him to command.

Counsel should not cite legal authorities or argue the facts of other cases during argument on the findings or the sentence.[361] However counsel may refer to the principles of law applicable to the case.[362] Trial counsel may not comment on the exercise by an accused of his rights under article 31 (a) and (b) of the Code,[363] or accused's failure to take the witness stand[364] nor may trial counsel

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[359] MCM, 1951, para. 72 a.

[360] United States v. Lyon, 15 U.S.C.M.A. 307, 35 C.M.R. 279 (1965); United States v. Lee, 4 U.S.C.M.A. 571, 16 C.M.R. 145 (1954); ACM 9406, Keller, 18 C.M.R. 473 (1954). Also see United States v. Beatty, 10 U.S.C.M.A. 311, 27 C.M.R. 385 (1959)

[361] See United States v. Fair, 2 U.S.C.M.A. 521, 10 C.M.R.19(1953); United States v. Bouie, 9 U.S.C.M.A. 228, 26 C.M.R. 8(1958); United States v. Johnson, 9 U.S.C.M.A. 178, 25 C.M.R. 440 (1958).

[362] United States v. Gravitt, 5 U.S.C.M.A.249, 17 C.M.R.249 (1954).

[363] United States v. Skees, 10 U.S.C.M.A.285, 27 C.M.R.359 (1959); United States v. Hickman, 10 U.S.C.M.A. 568, 28 C.M.R. 134 (1959).

[364] Griffen v. California, 38 U.S. 609 (1965); United States v. Skees, supra, note 363. Cf. NCM 65-1445, Blair, 36 C.M.R. 750 (1965).

ask the court to consider the probable effect of its findings on relations between the military and civilian communities.[365]

Argument based upon the evidence and reasonable inferences therefrom is not rendered improper by the fact that it may be severely critical or denunciatory of the accused or may incidentally stir the sympathies or arouse the prejudices of the members of the court against him.[366] But it is improper for counsel in his argument to use vituperative and denunciatory language, or other appeal to, or make reference to religious beliefs, or other matters, where such language and appeal is calculated only to unduly excite or arouse emotions, passions and prejudice of the court to the detriment of the accused.[367]

Accordingly referring to the accused as a "barracks thief of the worst type"[368] or a liar[369] has been held not to be improper when they accurately describe the crime committed and their use finds support in the testimony. But trial counsel's vilifying an accused and characterizing him as a "liar, rotten character and moral leper" has been held to constitute emotional, inflammatory, misleading, highly improper and definitely prejudicial argument.[370]

Calling attention to the accused's presence in the courtroom is not error. But argument of the trial counsel referring to the lack of emotion on the face of the accused during the course of the trial is objectionable because it interjects non evidentiary matters into the case which cannot properly be considered

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[365] United States v. Cook, 11 U.S.C.M.A.99, 28 C.M.R.323 (1959). See also United States v. Weaver, 13 U.S.C.M.A. 147, 32 C.M.R. 147 (1962).

[366] United States v. Day, 2 U.S.C.M.A. 416, 9 C.M.R.46 (1953); United States v. Valencia, 1 U.S.C.M.A. 415, 4 C.M.R. 7 (1952).

[368] ACM 9406, Keller, 18 C.M.R. 473 (1954).

[369] United States v. Doctor, 7 U.S.C.M.A.126, 21 C.M.R. 252 (1956). But cf. ACM 7395, Westergren, 14 C.M.R. 560 (1953).

[370] NCM 252, Douglas, 13 C.M.R. 529 (1953).

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by the court members.[371] Comment by trial counsel that he could call more witnesses to substantiate the government's case also usually constitutes unsworn testimony and is error but has been held permissible when used as reply advocacy to rebut defense counsel's argument imputing bad faith to the trial counsel in charging him with suppressing available testimony.[372]

It is improper for counsel to assert to the court his personal belief as to the guilt or innocence of the accused, and he should not bring to the attention of the court any intimation of the views of the convening authority or those of the staff judge advocate. But it is not improper for him to argue or express his opinion that the accused is guilty where he states, or it is apparent, that such opinion is based solely on the evidence as distinguished from his personal opinion.[373]

If argument of counsel is merely illogical or absurd but not subject to objection as being improper, the appropriate remedy is exposure and answer by his opposing counsel.[374]

PRESENTENCING ARGUMENT

Neither the Code nor the Manual provide for argument of counsel in regard to the sentence. It is however entirely proper and appropriate for both trial and defense counsel to argue on the quantum of punishment that should be adjudged after the introduction of all evidence relating to the sentence.[375] Indeed, it

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371. United States v. Hurt, 9 U.S.C.M.A.735, 27 C.M.R. 3,50 (1958).
372. United States v. Andersen, 12 U.S.C.M.A.223, 30 C.M.R.223(1961). See also United States v. Tackett, 16 U.S.C.M.A.226, 36 C.M.R.382 (1966).
373. ACM 9406, Weller, 18 C.M.R.473(1954);MCM,1951,paras. 44g, 48g.
374. United States v. Hurt, 9 U.S.C.M.A.735, 27 C.M.R.3,49 (1958).
375. United States v. Olsen, 7 U.S.C.M.A. 242, 22 C.M.R. 32 (1956).

has been held prejudicial to the accused if his defense counsel does not present evidence in extenuation and mitigation and argue as to the sentence.[376]

In general, the principles governing arguments of counsel before findings are equally applicable to arguments in the presentencing procedure. After each side has introduced any appropriate matter that may have bearing on the sentence, trial counsel has the right to make an opening argument on the quantum of punishment and, if any is made on behalf of the defense, the closing argument.[377] But the arguments of both counsel are required to be confined to the facts adduced during the presentencing procedure, the evidence in the case and the reasonable deductions therefrom insofar as it affects the sentence and to the arguments of the opposing counsel and may not go beyond the bounds of fair argument.[378] Neither can include matter not supported by the facts or which the court is not justified in considering in determining the sentence. The fact that the accused failed to testify either on the general issue or in extenuation or mitigation may not be mentioned.[379]

It is improper for trial counsel to contend that the convening authority has already considered clemency factors and reduced the accused's punishment by directing trial by a special court-martial[380] or to refer to possible ameliorative action by the board of correction for military records.[381] It is also improper to argue for the maximum sentence and then suggest that military cor-

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[376] See United States v. Wimberley, 16 U.S.C.M.A.3, 36 C.M.R.159(1966); United States v. McMahon, 6 U.S.C.M.A.709, 21 C.M.R.31 (1956).

[377] CM 412244, Wilson, 35 C.M.R.576, *pet. denied*, 15 U.S.C.M.A.683, 35C.M.R. 478(1965). *Contra*, U.S. Dep't. of Army, Pamphlet No.27-9, The Law Officer para. 88 (1958); U.S. Dep't of Army, Pamphlet No.27-173, Military Justice-Trial Procedure 229 (1964).

[378] United States v. Olson, 7 U.S.C.M.A.242, 22 C.M.R.32(1956).

[379] ACM 9406, Weller, 18 C.M.R.473 (1954).

[380] United States v. Crutcher, 11 U.S.C.M.A.483, 29C.M.R.299(1960); United States v. Carpenter, 11 U.S.C.M.A.418, 29 C.M.R.234 (1960).

[381] United States v. Simpson, 10 U.S.C.M.A.229, 27 C.M.R.303(1959).

rectional and penal systems would then provide the accused needed psychiatric care because such argument can be equated to an invocation of the condemned practice of adjudging a harsh sentence in reliance on mitigating action by higher authority.[382]

Trial counsel may not in his presentencing argument purport to speak for the convening authority;[383] nor refer to the convening authority's views;[384] nor refer to any departmental policy directives with regard to sentencing matters.[385] Counsel are also precluded from making reference to any punishment or quantum of punishment in excess of that which can be lawfully imposed in the particular case by the present court.[386]

It has been held that the admissibility as evidence in mitigation and extenuation of a document indicating that the victim of the alleged offense did not desire the accused to be punished further was within the sound discretion of the law officer and his refusal to admit such a document did not constitute error.[387]

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[382] CM 411337, Jones, 34 C.M.R.642(1964);CM 411402, Stevenson,34C.M.R.655(1964).

[383] United States v. Lackey, 8 U.S.C.M.A.718, 25 C.M.R. 222 (1958).

[384] United States v. Carpenter, 11 U.S.C.M.A.418, 29 C.M.R. 234 (1960). Para. 44g(1) of the Manual provides that the trial counsel will not bring to the attention of the court any intimation of the views of the convening authority, or those of the staff judge advocate or legal officer, with respect to the guilt or innocence of the accused, appropriate sentence, or concerning any other matter exclusively within the discretion of the court. Also see UCMJ, art. 37.

[385] United States v. Fowle, 7 U.S.C.M.A. 349, 22 C.M.R.139 (1956).

[386] United States v. Whitacre, 12 U.S.C.M.A.345, 30 C.M.R.345(1961); United States v. Crutcher, 11 U.S.C.M.A.483, 29 C.M.R.299(1960). As to rehearings see United States v. Eschmann, 11 U.S.C.M.A.64, 28 C.M.R.288 (1959) holding that the law officer's instructions on a rehearing should only state the maximum sentence awarded (or approved) at the first trial and should not state any higher maximum which the Manual's table of maximum punishment might list for the offense.

[387] United States v. Ault, 15 U.S.C.M.A.540, 36 C.M.R.38 (1965).

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Oral [illegible] the [illegible].[363] [illegible].[364] [365] [illegible] refer [illegible], Counsel [illegible] of punishment [illegible] case by the [illegible] court.[366]

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366. [illegible]
367. [illegible]

Lastly, we face the problem of the BCD striker--the accused who wants a punitive discharge as his passport out of the service. It is clear that while trial counsel can argue for a specific sentence and type of punitive discharge, it is improper for defense counsel to acknowledge that a punitive discharge is appropriate when the accused has asked to be retained in service.[388] But what are the defense counsel's ethical obligations when the accused does not wish to be retained and even takes the witness stand to express his desires. A Navy Board of Review in NCM S-65 1378, Hoffman,[389] has indicated that the defense counsel must not assist the accused in this endeavor by posing appropriate questions to the accused while he is on the stand or subsequently arguing for the imposition of such a discharge. Defense counsel bears the responsibility to attempt to dissuade his client from this course of action and even if the client persists, counsel may not aid him. The special ethical code which governs the advocate who acts for another has long discredited the "alter ego" theory which would ascribe no individual responsibility to counsel for the actions he takes under the guise that he is only doing his client's bidding.

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388. United States v. Mitchell, 16 U.S.C.M.A.302, 36 C.M.R.458 (1966).
389. NCM S-65 1378, Hoffman, 4 October 1965 (unpublished).

CHAPTER V

DUTY TO FELLOW ATTORNEYS

> "The highest reward that can come to a lawyer is the esteem of his professional brethren."
>
> -Chief Justice Hughes, 13 Proceedings of the American Law Institute, 61-62 (1936)
>
> "And do as adversaries do in law,
> Strive mightily, but eat and drink as friends."
>
> -Shakespeare, *The Taming of the Shrew* (Act 1 Sc 2 line281)

A. RELATIONS WITH OTHER ATTORNEYS

1. ILL FEELINGS AND PERSONALITIES

The Rules-

a. The Manual (para. 42b):

> In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward the opposing counsel. Personal colloquies between counsel which cause delay or promote unseemly wrangling should be carefully avoided. The conduct of counsel with each other should be characterized by candor and fairness.

b. Canon 17:

> Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling must be carefully avoided.

c. Trial Code 14 (b) and 20 (i):

> A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients.
> A lawyer should not engage in acrimonious conversations or exchanges involving personalities with opposing counsel, but should address his objections, requests and observations to the court.

The Case Law-

All professions stress the importance of cordial relations among their

members.[390] The continuing furtherance of the legal profession depends, in part, upon a fraternal sense of goodwill and mutual confidence among the individuals who practice it. Goodwill and mutual confidence are strengthened by adherence to ethical standards and by the observation of professional etiquette and courtesy.

Failure to adhere to the cited standards will subject offending counsel to possible contempt or suspension proceedings and probable criticism from appellate tribunals. Everyone aspires to see his name or deeds in print, but somehow one gets the feeling that it would be preferable if the citation was commendatory.

When a trial counsel implies that the defense counsel has fabricated the defense for his client, that trial counsel has the duty to produce hard evidence not mere insinuations or veiled references to the fact that a shrewd defense counsel can prompt an accused to "remember" facts bolstering an alleged defense.[391]

Common courtesy and customs of the bar require that counsel permit his adversary to complete a statement without being interrupted.[392] Similarly it is a breach of customary courtroom etiquette to interrupt opposing counsel during his argument to the court unless that argument prejudicially exceeds the bounds of fair comment. The personal differences between opposing counsel can not be allowed to precipitate an acrimonious verbal exchange between themselves. As has been appropriately noted, the reporter can only take down the remarks of one person at a time.[393] Remarks by defense counsel, when asked for a page number by his adversary such as: "No, you haven't shown me any courtesy, why should I show you any?"are unprofessional and as a practical matter do nothing to fur-

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[390] Carey & Doherty, Ethical Standards of the Accounting Profession 147(1966).

[391] United States v. Allen, 11 U.S.C.M.A. 539, 29 C.M.R. 355 (1960).

[392] United States v. Oakley, 11 U.S.C.M.A. 529, 29 C.M.R. 345 (1960).See also United States v. Bigelow, 11 U.S.C.M.A. 527, 29 C.M.R. 343 (1960).

[393] United States v. Hedges, 14 U.S.C.M.A. 23, 33 C.M.R. 235 (1963).

ther his client's cause in the eyes of the court.[394]

The classic case in this area is found in United States v. Lewis.[395] Therein the conduct of both the trial counsel and the defense counsel, coupled with the failure of the law officer to keep counsel within proper limits, deprived the accused of a fair trial. A bitter personal antagonism had developed between opposing counsel and this antagonism led not only to sharp personal exchanges of derogatory remarks, but also to the mention of uncharged misconduct by the accused, reference to his having pleaded guilty to similar charges in a civilian court, and disclosure of his unsuccessful attempt to negotiate a pretrial agreement.

Both counsel were mature members of the bar whose experience should have taught them better. As if this were not bad enough, counsel testified under oath on the stand with the Lieutenant Colonel trial counsel charging the defense counsel with an attempt to smear him as an individual trial counsel and the Air Force in general. Trial counsel then accused the defense counsel of unethical and improper trial conduct. Not to be outdone, the defense counsel, a retired Colonel, repeatedly made similar allegations concerning the trial counsel.

In its decision in the Lewis case, the Court of Military Appeals noted that both attorneys had far exceeded the bounds of propriety and censured them for their unbridled outbursts and unjudicious exchanges which deprived the court-martial of the judicial caliber required by the Code. The court condemned as severely as possible the unprofessional acrimonious exchanges of counsel in an effort to blacken each other's reputation before court members who had no official interest in their tirades.

Now, while a wag might say that the moral to counsel in this case is that people who live in glass houses should not throw stones, the true point is that

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[394] Ibid.

[395] 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966)

[illegible][98]

[illegible][99] [illegible]

[illegible]

[illegible]

[illegible]

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[98] Ibid.

[99] [illegible]

while a trial is a battle, the combat envisioned in the military arena is that between the government and the accused according to the rules, not a pier six brawl between counsel.

2. CO-COUNSEL AND CONFLICTS OF OPINION

The Rules-

a. The Manual (para. 46d):

> When the defense is in charge of individual counsel, civil or military, the duties of defense counsel as associate counsel are those which the individual counsel may designate.

b. Canon 7 and Trial Code 6:

> A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.
> When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been over-ruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.
> Efforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

The Case Law-

When the accused engages individual counsel, that attorney, acting with the consent of the accused, may act as leading counsel and take full charge of the defense in the case. However, individual counsel's assumption of that position and responsibility does not affect the appointed defense counsel's professional position by depriving him of or diminishing his status, dignity or responsibilities as an officer and attorney. He does not thereby become a subordinate, clerk or errand boy of individual counsel, required to follow the

latter's bidding and instructions with reference to all matters.[396]

If individual defense counsel desires the continued assistance of appointed military counsel, he must be prepared to treat him as an associate, an equal and not as an underling. In the event it becomes apparent that the two counsel cannot resolve differences of opinion with regard to trial tactics, individual counsel should, consult with the accused and if the latter concurs, then request that the appointed defense counsel be excused from further participation in the case. Should this not be done, then neither individual counsel nor the accused can later be heard to criticize the appointed defense counsel's actions at trial in accordance with his own professional judgment instead of adopting the views of individual counsel.[397]

Similar obligations also rest on the appointed defense counsel. He should consult with the accused when conflicts of opinion with co-counsel affect the accused's vital interests. Ethical considerations and the protection of his client's interest dictate that the appointed defense counsel's manner and deportment at trial not register disapproval or criticism of the individual counsel.[398]

When an accused pleads not guilty and his individual defense counsel presents a vigorous defense and final argument, associate defense counsel should not destroy his co-counsel's efforts and sacrifice the accused in uncalled for closing remarks amounting to a confession of guilt. Although such conduct seems incomprehensible, it happened in <u>United States v. Walker</u>.[399] Therein the Court of Military Appeals held that this open conflict between individual counsel and appointed defense counsel, as to what verdict the court should return, seriously

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[396] CM 399 453, Williams, 27 C.M.R. 670, <u>pet. denied</u>, 10 U.S.C.M.A. 682, 27 C.M.R. 512 (1959).

[397] <u>Ibid</u>.

[398] See CM 399 453, Williams, 27 C.M.R.670, <u>pet. denied</u>,10 U.S.C.M.A.682, 27 C.M.R. 512 (1959).

[399] 3 U.S.C.M.A. 355, 12 C.M.R. 111 (1953).

lessened the force of the preffered defense of excusable homicide and substantially injured the defendant in his right to a fair trial.

3. AGREEMENTS AND STIPULATIONS

The Rules-

a. The Manual (paras, 44g(1),48d):

> With a view to saving time, labor and expense both the trial and defense counsel should join in appropriate stipulations as to unimportant or uncontested matters.

b. Canon 25:

> A lawyer should not ignore known customs or practice of the Bar of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

c. Trial Code 14(a):

> A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements, implied by the circumstance or by local custom.

The Case Law-

Counsel's word is his bond. The parties to a court-martial may make a written or oral stipulation as to fact or expected testimony.[400] An accused, who fails to object after having been afforded the opportunity to do so, is bound by stipulations entered into by his counsel if the stipulation is accepted by the law officer (or president of the special court-martial) acting within his discretion.[401]

As a practical matter, stipulations may be defensive tactical instruments of no little importance. They may be used by counsel to avoid the danger of an

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[400] MCM, 1951, para. 154 b.

[401] United States v. Cambridge, 3 U.S.C.M.A. 377, 12 C.M.R. 133 (1953); NCM S-58-01854, Field, 27 C.M.R. 863 (1958).

adverse psychological effect produced by a parade of prosecution witnesses.[402] Counsel must be cautious however that he does not stipulate away the entire case or stipulate to matters which impeach his client's sworn testimony.[403] This is a precarious responsibility and the judgment required by counsel involves a keen and accurate analysis of the situation.

Once a stipulation of fact has been offered and accepted in court, counsel are bound by it unless it is withdrawn or stricken from the record. Consequently counsel may not later during final argument without other evidence in the record, argue facts inconsistent with that stipulation of fact.[404]

The wording of stipulations of fact in guilty plea cases must be carefully examined with a mature and experienced eye. If the facts stipulated conflict with the plea, that plea will be set aside as being improvident. However, in order to render that plea of guilty improvident, it is not sufficient to find the stipulated facts do not establish the guilt of the accused. They must conflict with his plea, negative his guilt, and show his judicial confession is inconsistent with what the parties to the trial have freely agreed are the facts constituting the occurrences giving rise to the charge.[405]

B. CONTACT WITH THE OPPOSITE PARTY

The Rules-

a. The Manual (para. 44h):

> The trial counsel's dealings with the defense should be through any counsel the accused may have. Thus, if he desires to know how the accused intends to plead or whether an enlisted accused desires enlisted members on the court, he will ask the regularly

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[402] United States v. Colbert, 2 U.S.C.M.A. 3, 6 C.M.R. 3 (1952).

[403] NCM S-58-01854, Field, 27 C.M.R. 863 (1958). See MCM, 1951, para.154b(1).

[404] United States v. Gerlach, 16 U.S.C.M.A. 383, 37 C.M.R. 3 (1966). Compare however, stipulations of expected testimony. Such stipulations do not admit the truth of the indicated testimony. See MCM, 1951, para. 154b(2).

[405] United States v. Walter, 16 U.S.C.M.A. 30, 36 C.M.R. 186 (1966).

appointed defense counsel or other counsel, if any, of the accused.

b. Canon 9 and Trial Code 16:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. He should avoid everything that might tend to mislead a party not represented by counsel, and he should not undertake to advise him.

The Case Law-

Once the accused has defense counsel assigned to or retained by him, the trial counsel, his representatives, criminal investigation personnel or any other person associated with the case must go through that defense counsel before approaching the accused.[406] In the recent case of CM-410956, *Bostic*,[407] however an Army Board of Review analogized paragraph 44*h* of the Manual to Canon 9 but held that the appointment of defense counsel to represent an accused as to one offense does not invalidate statements taken from that accused without the knowledge of his counsel by criminal investigators relative to an entirely different offense not yet the subject of criminal charges.

Paragraph 44*h* of the Manual is obviously based on Canon 9. An Air Force Board of Review in the *Seale* case[408] considered the application of Canon 9 to the military and as persuasive authority for its holding that it was unethical for the trial counsel to question the accused in the absence of defense counsel, the Board cited an informal decision of the American Bar Association's Committee on Professional Ethics and a Texas State Bar interpretation of a similar canon

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[406] CM 403428, Mason, 29 C.M.R. 599 (1960); CM 399759, Grant, 26 C.M.R. 692 (1958).

[407] 35 C.M.R. 511 (1964), *pet. denied*, 15 U.S.C.M.A. 409, 35 C.M.R. 381(1965) distinguishing CM 403428, Mason and CM 399759 Grant, *supra*, note 406.

[408] ACM S-17411, Seale, 27 C.M.R. 951 (1958).

which held to the same effect.[409] Although the Board found no prejudice to the accused in the <u>Seale</u> case because the evidence of the accused's guilt was so convincing that it precluded any reasonable possibility of prejudice, the Board issued a stern caveat that it would reverse any conviction without hesitancy in the event of a showing of a deliberate disregard of the Canons of Ethics which reasonably could have affected the deliberations of the court. Trial counsel who has ears - let him hear.

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[409] <u>Id</u>.at 954. The Board cited: (1) Informal Decision No. 249, (erroneously cited in the opinion as No. 241), ABA, Opinions of the Committee on Professional Ethics and Grievances, app. A. 640 (1957) stating that where three persons are accused of related thefts, the prosecutor may not, in the proceedings against one of them, interview another of them represented by counsel in the absence of the latter's lawyer; and (2) Opinions 137 and 144, Rules and Canons of Ethics, State Bar of Texas, 1958, to the effect that it is unethical for a District Attorney to deal directly with a defendant in a criminal case.

CHAPTER VI.

THE ADVOCATE'S DUTY TO HIMSELF

"If good men were only better
Would the wicked be so bad?"
-John Chadwick, A Timely Question, Stanza 1.

"This above all: to thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man."
-Shakespeare, Hamlet.

A. THE LAWYER'S DUTY IN ITS LAST ANALYSIS

The Concept-

a. Canon 32 and Trial Code 27:

No client, however powerful, nor any cause, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose minister he is, or disrespect of the judicial office, which he is bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

b. Canons 15, 29 and 31 and Trial Code 10 (b):

The lawyer must obey his own conscience and not that of his client. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.
The responsibility for advising as to questionable transactions, and for urging questionable defenses is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

The Considerations-

The ethical climate of the legal profession is maintained by two forces.

The first is the effect of the individual attorney's conscience upon his professional conduct. The second is the application, or threat of application, of legal sanctions against an erring attorney in disciplinary proceedings.[410]

The Canons and Trial Code represent the negative approach saying: Thou shall not. They ought to be there but the individual must keep stirring his own sense of conscience to remind himself that the codes of legal ethics represent, for the most part, the least, not the highest standard to which one should aspire.[411]

No lawyer is required to go against the dictates of his own conscience in the exercise of his advocacy. The advocate cannot, more than any other man, keep his personal conscience and his professional conscience in separate vest pockets. Indeed, every advocate is, in some measure, also the keeper of his client's conscience.[412]

The incidents of trial are the counsel's responsibility. He may neither counsel nor countenance improprieties during the trial nor should he permit his client to engage in such activities. Nor may counsel shift the burdens of his own conscience onto the shoulders of the law officer. Certainly, matter which is clearly inadmissible will be stricken by the law officer upon the objection of opposing counsel, and the court-members will be instructed to disregard it. But can they? Human nature does not change merely because one dons the garb of a court-member. The human mind is not a slate from which ideas and thoughts emblazoned thereon can be wiped out at the will and instruction of another. As a practical matter, court-members can not erase from their minds the damning effect of answers to questions that should not have been asked or evidence that

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[410] Sutton, *Re-evaluation of the Canons of Professional Ethics: A Revisor's Viewpoint*, 33 Tenn.L.Rev. 132, 134 (1966).
[411] Pike, Beyond the Law 16 (1963).
[412] Orkin, Legal Ethics 263 - 265 (1957).

should not have been shown.[413]

To say that it is up to the law officer to decide is a mere subterfuge to avoid consideration of the basic ethical question whether such information should have been elicited in the first place. Counsel should not attempt to offer evidence before a court-martial which he knows to be inadmissible although an offer, in good faith, of evidence of doubtful competency will not constitute a deliberate flouting of the Canons and the rules of evidence.[414]

In the last analysis personal honor and self-truth must direct the advocate to his avowed goals of right conduct and justice and he should not permit the instructions of his client or the desire to gain a victory to shunt him aside. He must so conduct himself so as not to lose his own self respect.

Within this framework of perfect intentions and imperfect men an advocate's conduct should be guided by the words of a former Solicitor General of the United States:

> In such a profession as the law there is no room for fellowship with the dishonest, the unfaithful, the untrustworthy, or the unpatriotic, and no useful place for those who are ignorant or inadequately prepared. It is our duty to the public, to the government, and to our profession to guard jealously professional standards[415] and ideals, and to see that they are kept high and clear.

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413. United States v. Grant, 10 U.S.C.M.A. 585, 28 C.M.R. 151(1959).

414. United States v. Johnson, 3 U.S.C.M.A. 447, 13 C.M.R. 3 (1953).

415. Address by William L. Frierson, 5th session, Conference on Legal Education 1922. See 8 A.B.A.J. 156 (1922).

CHAPTER VII.

DISCIPLINARY PROCEEDINGS AGAINST UNETHICAL PRACTICES OF COUNSEL

> "The temptations which beset a young man in the outset of his professional life...are very great.
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> —Sharswood, Essay on Professional Ethics 168-69 (5th ed,1907).
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> "Counsel must become less viciously contentious, more skillful, more intent on substance than on skirmishing for a better position..."
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> —1 Wigmore, Evidence 263(3d ed.1940).
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> "Where the conduct of any attorney is such that all right-minded people would conclude that it is not honorable, it must necessarily be unprofessional."
>
> —Justice Farmer, People ex rel Chicago Bar Assn. v. Baker 311 Ill.66,82,142 N.E. 554,559(1924).

A. SANCTIONS AND DISCIPLINARY POWER

1. CONTEMPT AND DISCIPLINARY PROCEEDINGS

Under article 48 of the Code, a court-martial may punish for contempt any person who uses any menacing words, signs or gestures in its presence or who disturbs its proceedings by any riot or disorder. Such punishment may not exceed confinement for thirty days or a fine of $100, or both. This article has been interpreted to encompass contemptuous conduct by an attorney.[416]

When the conduct of a person before a court-martial constitutes a contempt within the meaning of article 48, the regular proceedings of the court are suspended and the person directed to show cause why he should not be held in contempt. He is given an opportunity to explain his conduct, and the law officer then rules as to whether the person should be held in contempt, subject to objection of any member of the court-martial. The procedure here is the same as

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[416] See United States v. DeAngelis, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953); MCM , 1951, para. 10.

that on a motion for a finding of not guilty. After there has been a preliminary determination that the person be held in contempt, the court-martial then closes and by two-thirds vote, on secret written ballot, determines whether the person should be held in contempt, and in the event of conviction, an appropriate punishment. In order to be effective, a punishment for contempt requires the approval of the convening authority who designates the place of confinement, if any has been adjudged.[417]

In United States v. DeAngelis[418] the Court of Military Appeals described an individual defense counsel's language as provocative and highly insulting. It concluded that it could not ignore counsel's contemptuous tirades and pointed out that his obstructive and abusive actions flouted the authority of the law member,[419] made a mockery of the requirement of decorous behavior and impeded the expeditious, orderly and dispassionate conduct of the trial. The Court went on to state that in instances of such flagrantly contemptuous conduct, law officers should not hesitate to employ the contempt provisions of the Code after counsel has been warned concerning his actions.

2. SUSPENSION OF COUNSEL

Under paragraph 43 of the Manual, action may be taken by a convening authority to recommend suspension from practice before courts-martial of any counsel acting before a court-martial who is guilty of professional or personal misconduct of such a serious nature as to show that he is lacking in competence, integrity, or ethical or moral character. Suspension will only be effected by the Judge Advocate General of the armed force concerned after a hearing before a

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[417] MCM, 1951, para. 118.
[418] 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).
[419] The DeAngelis case was commenced prior to the effective date of the Code.

board of certified attorneys at the general court-martial level.[420] Suspension by the Judge Advocate General of one armed force does not automatically result in suspension from practice before the courts-martial convened in another service,[421] however such suspension may be grounds for suspension by other services.[422] Such suspension is separate and distinct from any matter involving contempt under article 48 of the Code and from withdrawal of certification pursuant to articles 26 and 27 of the Code.[423]

Misconduct warranting suspension includes:[424]

a. demonstrated incompetence while acting as counsel during pretrial, trial or post trial stages of a court-martial;
b. preventing or obstructing justice, including the deliberate use of frivolous or unwarranted dilatory tactics;
c. fabricating papers or other evidence;
d. tampering with a witness;
e. abusive conduct toward the members of the court, the law officer or other counsel;
f. conviction of a felony or any offense involving moral turpitude or a contempt conviction under article 48 of the Code;
g. an attempt by one who is a security risk to act as counsel in a case involving a security matter;
h. disbarment or suspension from practice by a Federal, State or foreign court;
i. suspension from practice as counsel before courts-martial by The Judge Advocate General of another armed force, General Counsel of the Treasury Department or by the United States Court of Military Appeals;
j. flagrant or continued violations of any specific rules of conduct prescribed for counsel in paragraphs 42,44, 46 and 48 of the Manual or the Canons of Professional Ethics adopted by the American Bar Association, or of the Code of Trial Conduct adopted by the American College of Trial Lawyers.

Action to suspend should not be initiated solely because of personal prejudice or hostility toward counsel, because he has presented an aggressive, zealous or novel defense, or when his apparent misconduct as counsel stems solely from

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[420] U.S.Dep't.of Navy, JAG Manual § 0135c(3),(4)(1961); [hereafter cited as JAG Manual]; Army Reg. No.27-11, para.3c,d(5 March1965) [hereafter cited as AR 27-11].

[421] MCM,1951,para.48. See Feld, Manual of Courts-Martial Practice and Appeal 162(1957).

[422] JAG Manual § 0135b(9); AR No.27-11, para.2.

[423] JAG Manual § 0135a,c(5);AR No. 27-11, para 5.

[424] JAG Manual § 0135b; AR No. 27-11, para. 2.

inexperience or lack of instruction in the performance of legal duties.[425] Nor should suspension action be initiated unless other available remedial measures, including punitive action have failed to induce proper behavior or are inappropriate.[426]

All counsel, military or civilian, appearing before a court-martial are subject to suspension proceedings for misconduct except that, in contrast to the Navy's position, the Army's proceedings are not applicable to non-certified counsel appearing before a special court-martial unless the accused has selected or provided him as counsel under article 38 (b) of the Code.[427]

The Judge Advocate General of the service concerned may, upon petition of a person who has been suspended, and upon the showing of good cause, modify or revoke any prior order of suspension.[428]

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[425] 425. JAG Manual § 0135 b.

[426] 426. JAG Manual § 0135 c (1); AR No. 27-11, para.3.

[427] 427. Compare JAG Manual § 0135 a with AR No. 27-11, para. 1.

[428] 428. JAG Manual § 0135 c (4); AR No. 27-11, para. 4.

CHAPTER VIII.

CONCLUSIONS

"What is left when honor is lost?"
-Publilius Syrus-Maxim 265.

The Canons of Professional Ethics are like the Holy Bible - -everyone knows of them, thinks he knows what they say but never has really read and studied them.

Our court-martial system under the Uniform Code of Military Justice is bottomed on the adversary system. The primary purpose of that system is to preserve liberty and concomittantly to find and act upon the truth as nearly as that may be possible within the context of the adversary system. Accordingly, the government always wins its cases when justice is done - even though the result may be acquittal.

Military advocates practicing before courts-martial occupy a unique position. They are the heart of an adversary system inside a military world dealing with human beings in a rapidly changing environment. Theirs is the privilege of contest in an arena circumscribed by ethical responsibilities which have the force of law as prescribed by the Manual for Courts-Martial and departmental regulations.

Violations of professional ethics by trial counsel which demonstrate an intention to deliberately flout the Canons or could have reasonably affected the deliberations of the court members on either the findings or sentence may be held to be prejudicial to the accused and result in a reversal of his conviction unless there is other clear and convincing evidence of his guilt.

Moreover, a word to the wise! Both trial counsel and defense counsel who violate the Canons, the Manual adaptation thereof or the Trial Code subject themselves to the probability of censure from the law officer and appellate tribunals and the possibility of contempt and or suspension proceedings.

But only a knowledgeable voluntary acceptance of and adherence to the rules of the contest by the Military Officer Lawyer, rather than fear of sanction, will produce a military bar truly in keeping with the high traditions of our honorable dual professions.

The many ethical responsibilities which flow from the role of lawyer as an advocate in the military adversary system are succinctly embodied in the preamble to the Trial Code and the Canons:

To his client, the advocate owes undivided allegiance, the utmost application of his learning, skill and industry and the employment of all appropriate legal means within the law and the spirit of the Canons;

To opposing counsel, the advocate owes the duty of courtesy, candor in the pursuit of truth, cooperation in all respects not inconsistent with his client's interests and scrupulous observance of all mutual understandings;

To the court, the advocate owes respect, diligence, candor and the maintenance of dignity but no obligation to produce evidence against his client;

And to his service and country, the military advocate owes the maintenance of professional dignity, bearing, allegiance and independence as a Military Officer Lawyer.

The ethical responsibilities to which advocates must adhere complement rather than conflict with each other. They consist of a composite of principles and rules salted with decisional interpretations, admonitions and suggestions all aimed at achieving the best performance out of the best lawyers the military can obtain.

COMPARISON OF THE CANONS WITH THE MANUAL

Canons	Manual
"It is the duty of the lawyer to maintain towards the Courts a respectful attitude. . . ." (Canon 1) "Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. . . ." (Canon 3) "All attempts to curry favor with juries by fawning, flattery, or pretended solicitude for their personal comfort are unprofessional." (Canon 23)	"In performing their duties before courts martial, counsel should maintain a courteous and respectful attitude toward the law officer, the members of the court and opposing counsel. . . ." (MCM, 42b)
"It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused. . . . Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits . . . ." (Canon 5)	"He [the defense counsel] will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused. . . ." (MCM, 48c)
"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." (Canon 5)	"Although his [trial counsel's] primary duty is to prosecute, any act (such as the conscious suppression of evidence favorable to the defense) inconsistent with a genuine desire to have the whole truth revealed is prohibited." (MCM, 44g)
"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel." (Canon 6)	"A report of the facts will be made at once to the convening authority . . . whenever it appears to . . . the defense counsel . . . that any member of the defense named in the appointing order is for any reason, including unfitness, bias, prejudice, hostility toward the accused, lack of legal qualifications, or

	previous connection with the same case, unable promptly to perform his duties in any case." (MCM, 46b) "It is his [the defense counsel's] duty . . . to disclose to the accused any interest he may have in connection with the case, any ground of possible disqualification, and any other matter which might influence the accused in the selection of counsel. . . ." (MCM, 48c)
"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." (Canon 6)	"It is his [the defense counsel's] duty . . . to represent the accused with undivided fidelity, and not to divulge his secrets or confidence." (MCM, 48c) "[A]ny person who has acted for the defense [shall not] act subsequently in the same case for the prosecution. . . ." (MCM, 6a)
"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of all the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." (Canon 6)	"No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently . . . , unless expressly requested by the accused . . ., as defense counsel or assistant defense counsel in the same case." (MCM, 6a) "No person who has acted for the prosecution shall act subsequently in the same case for the defense . . . ." (MCM, 6a) "When a defense counsel is designated to defend two or more co-accused in a joint or common trial, he should advise them of any conflicting interests in the conduct of their defense which would, in his opinion, warrant a request on the part of any of the accused for other counsel." (MCM, 48c)

"A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation." (Canon 8)	"Counsel should endeavor to obtain full knowledge of all the facts of the case before advising the accused, and he is bound to give the accused his candid opinion of the merits of the case." (MCM, 48f)
"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." (Canon 9)	"His [the trial counsel's] dealings with the defense should be through any counsel the accused may have. Thus, if he desires to know how the accused intends to plead . . . he will ask the . . . defense counsel . . . ." (MCM, 44h)
"It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." (Canon 15)	"It is improper for him [the defense counsel] to assert in argument his personal belief in the innocence of the accused. . . ." (MCM, 48b) "It is improper for him [the trial counsel] to assert before the court his personal belief as to the guilt or innocence of the accused." (MCM, 44g)
"The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. . . . The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client." (Canon 15)	"An officer or other military person acting as counsel for the accused before a general or special court martial . . . will guard the interests of the accused by all honorable and legitimate means known to the law." (MCM, 48c)
"All personalities between counsel should be scrupulously avoided." (Canon 17)	"Personal colloquies between counsel which cause delay or promote unseemly wrangling should be care-

	fully avoided." (MCM, 42b)
"A lawyer should always treat adverse witnesses and suitors with fairness and due consideration. . . ." (Canon 18)	"In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward . . . opposing counsel, and should treat adverse witnesses and the accused with fairness and due consideration." (MCM, 42b)
"When a lawyer is a witness for his client, except as to purely formal matters . . ., he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client." (Canon 19)	
"Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously." (Canon 20)	"As publication in the public press, or on radio or television, of the circumstances of a pending case may interfere with a fair trial or otherwise prejudice the due administration of justice, counsel should refrain from discussing such circumstances with representatives of the press, radio, or television unless authorized by the convening authority or other competent superior authority." (MCM, 42b)
"The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness. "It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as	"The conduct of counsel before the court and with each other should be characterized by candor and fairness. Counsel should not knowingly misquote the contents of a paper, the testimony of a witness, the language or argument of opposing counsel, or the language of a decision or a textbook; nor, with knowledge of its invalidity, should counsel cite as authority a decision that has been reversed or an official direc-

authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved . . . ." (Canon 22)	tive of the Department of Defense or any of the Departments, or one of their agencies, bureaus, branches, forces, commands, or units, that has been changed or rescinded." (MCM, 42b) "It is improper to state in an argument any matter of fact as to which there has been no evidence." (MCM, 72b)
"It is the duty of a lawyer to preserve his client's confidence. This duty outlasts the lawyer's employment, and extends as well to his employee; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences . . . without his [the client's] knowledge and consent. . . . The announced intention of a client to commit a crime is not included within the confidence which he is bound to respect." (Canon 37)	"It is his [the defense counsel's] duty . . . not to divulge his [the accused's] secrets or confidences."(MCM, 48c) "Communications between a client and his attorney (or the agent of the attorney) are privileged when made while the relation of client and attorney existed and in connection with the matter for which the attorney was engaged, unless such communications clearly contemplate the commission of a crime--for instance, perjury or subordination of perjury. Military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge, are attorneys, and the accused is a client, with respect to the client and attorney privilege. . . . [T] he person entitled to the benefit of the client and attorney privilege is the client. . . . The general rule is that the court should neither require nor permit any such privileged communication to be disclosed unless the person who is entitled to the benefit of the privi-

	lege consents to the disclosure of the communication or otherwise waives the privilege." (MCM, 151b(2))
"A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand." (Canon 39)	'Counsel may properly interview any witness or prospective witness for the opposing side in any case without the consent of opposing counsel or the accused. . . . In interviewing a witness, counsel should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth when appearing as a witness at the trial." (MCM, 42c)

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